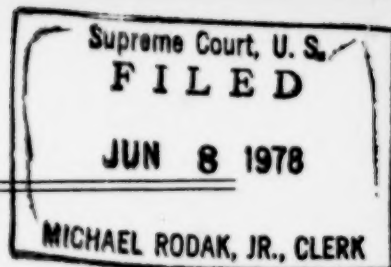


**A P P E N D I X
VOLUME I**



**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977**

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,
Appellants

VS.

E. RICHARD FRIEDMAN, OD., et al.,
Appellees

No. 77-1186

**TEXAS OPTOMETRIC ASSOCIATION,
INC., et al.,**
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

**Appeals From The United States District Court
For the Eastern District of Texas**

No. 77-1163 Filed February 16, 1978

No. 77-1164 Filed February 16, 1978

No. 77-1186 Filed February 21, 1978

Probable Jurisdiction Noted April 17, 1978

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1163
No. 77-1164
No. 77-1186

Appeals from the United States
District Court for the Eastern District of Texas

INDEX TO VOLUME I

	Page
RELEVANT DOCKET ENTRIES	A-1
COMPLAINT	A-8
DEFENDANTS' SECOND AMENDED ANSWER	A-17
MOTION TO INTERVENE	A-22
COMPLAINT IN INTERVENTION	A-28
RENEWED MOTION TO INTERVENTION	A-40
DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION	A-43
PETITION OF INTERVENTION BY TEXAS OPTOMETRIC ASSOCIATION, INC.	A-46
ORDER PENDENTE LITE	A-48
PLAINTIFFS' FIRST PROPOSED FINAL JUDGMENT	A-50

OBJECTIONS TO PLAINTIFF'S PROPOSED FINAL JUDGMENT	A-52
LETTER OF OCTOBER 3, 1977 BY DEFENDANTS COMPLAINING OF PROPOSED	A-56
LETTER OF OCTOBER 11, 1977 TO JUDGE STEGER COMPLAINING OF PROPOSED FINAL JUDGMENT	A-59
MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS AND INTERVENOR'S OBJECTIONS TO PLAINTIFF'S PROPOSED JUDGMENT AND IN SUPPORT OF JUDGMENT SUBMITTED BY DEFENDANTS AND INTERVENOR	A-64
LETTER OF OCTOBER 25, 1977 TO JUDGE STEGER	A-69
CONTRACT BETWEEN DR. ROGERS AND DR. MCGUIRE	A-71

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

CAUSE NO. B-75-277-CA

DATE	PROCEEDING
8-25-75	Original Complaint
8-25-75	Notice request Three Judge Court, by the Plaintiff.
9-18-75	Defendant's Answer
9-24-75	Amended Answer of Defendants, Dr. E. Richard Friedman, et al
10-9-75	Defendants' Motion for Hearing Venue Defense Before Trial.
10-17-75	Order signed by Chief Judge, Fifth Circuit, constituting a 3-Judge Court to hear and determine this case as follows: Honorable Irving L. Goldberg; Honorable Joe J. Fisher and Honorable William Steger.
10-28-75	Plaintiff's Response to Defendants' Objection to Venue.
11-18-75	Plaintiff's Motion to Substitute as Defendant Dr. John W. Davis for Dr. Phil Lewis; cause as to Dr. Phil Lewis to be dismissed without prejudice.
11-26-75	Order dismissed without prejudice Dr. Phil Lewis; substituted Dr. John W. Davis as party defendant.
1-7-76	Motion of the Texas Optometric Association, Inc., to file Amicus Curiae Brief.

A-2

- 1-7-76 Order signed by Judge Fisher, granting Texas Optometric Association Inc., leave to File an Amicus Curiae Brief in cause.
- 1-8-76 Deposition of Lois Ewald, Executive Secretary, Texas Optometry Board.
- 1-16-76 Answers and deposition of Dr. Mel Rockoff.
- 1-26-76 Deposition (oral) of Stanley Boysen with Exhibits.
- 1-29-76 Deposition of Nate Jay Rogers.
- 2-11-76 Motion for Leave to File Amended Answer by Defendant.
- 2-12-76 Motion to Dismiss and Supporting Brief, by Defendants.
- 2-12-76 Plaintiff's Motion for Order Pendente Lite authorizing plaintiff's continued operation of office in Austin, Texas.
- 2-17-76 Order signed by Judge Fisher 2-16-76 granting Defendant leave to amend answer.
- 2-17-76 Defendant's Second Amended Answer.
- 2-17-76 Motion to Intervene by Texas Senior Citizens Association, Port Arthur, Texas Chapter, & W.J. Dickinson, Ind. and as President of said Chapter.
- 2-18-76 Deposition Drs. Salvador S. Mora; John B. Bowen; and Jack Burton.
- 2-18-76 Order signed by Judge Fisher, Denying Motion to Intervene of Texas Senior Citizens Association, Port Arthur Chapter.

A-3

- 2-19-76 Deposition of Dr. Hugh Sticksel, Jr.
- 2-19-76 Motion for Summary Judgment by Defendants.
- 2-20-76 Deposition of Dean Chester Phieffer.
- 2-20-76 Oral Deposition of Dr. E. Richard Friedman.
- 2-20-76 Hearing begins, 9:45 A.M., before 3 Judges. Hearing concluded at 1:15 p.m. Further evidence to be presented by discovery method. All discovery to have been presented by May 3, 1976. Simultaneous briefs to be filed by both sides by May 18, 1976. Each side given to May 28, 1976 for reply briefs.
- 2-25-76 Interrogatories to be propounded to Stanley Boysen by plaintiff.
- 3-18-76 Deposition of Stanley Boysen.
- 4-9-76 Renewed Motion to Intervene by Texas Senior Citizens Association of Port Arthur Chapter.
- 4-22-76 Deposition of Dr. Salvador Mora.
- 4-27-76

Order signed by Judge Fisher 4-26-76, on Plaintiff's Motion for Protective Order, that Plaintiff has handed to Defendants photocopies of contracts between plaintiff and Dr. Richard P. McGuire and Dr. Roy S. Moore; contracts shall not be disclosed, exhibited or reproduced in any form; and upon judgment of District Court, contracts to be returned by defendants' counsel to plaintiff's counsel.

- 4-30-76 Sealed copies of contracts between plaintiff and Dr. R.P. McGuire and Dr. Roy S. Moore. Not to be opened other than order of Court.
- 5-5-76 Deposition of Lee Kenneth Benham.
- 5-6-76 Deposition of Dr. Mel Rockoff by Written Interrogatories.
- 5-14-76 Deposition of Dr. Salvador Mora.
- 5-17-76 Deposition of James J. Riley, Jr.
- 6-3-76 Affidavit of W.S. (Bill) Palmer, O.D.
- 6-11-76 Order signed by Judge Goldberg, Judge Fisher and Judge Steger, granting renewed motion of Texas Senior Citizens Association, Port Arthur, Texas Chapter, to Intervene in case.
- 6-11-76 Complaint in intervention of Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W.J. Dickinson, Ind. and as President.
- 6-28-76 Deposition of Cross Interrogatories of Dr. Lee Benham.
- 8-20-76 Deposition of Dr. Robert K. Shannon.
- 8-24-76 Deposition of Dr. Nelson Waldman.
- 8-26-76 Consent to Intervention by Defendants of Intervention of Texas Optometric Association, Inc.
- 8-24-76 Defendants' Motion to Dismiss and Defendants' Answer to Complaint in Intervention by Texas Senior Citizens Assoc.

- 9-13-76 Order signed by Judge Goldberg; Judge Fisher; and Judge Steger, granting leave to Texas Optometric Association, Inc. to Intervene in case.
- 9-13-76 Petition in Intervention by Texas Optometric Association, Inc.
- 9-20-76 Copy of Computer Print-out of all Optometrists licensed to practice optometry in State of Texas.
- 9-20-76 Certificate of Authenticity and correctness of copies of documents signed by Charles Schnabel, Secretary of the Senate of the State of Texas.
- 9-20-76 Certification by Lois Ewald, Sec. to Texas Optometry Board and Custodian of Board's records, that attached 13 items are part of records and true and correct copies.
- 9-20-76 Minutes of Texas Optometry Board, September 1969 through 1975.
- 9-24-76 Texas Optometry Board's Guidelines and Rules, certified by Lois Ewald, Sec. to Texas Optometry Board.
- 10-1-76 Texas Optometric Asso., Inc. Exhibit No. I (CA3-76-1180-G, Shropshire v. Lee Vision Center, complaint Northern District of Texas, Dallas Division.)
- 10-4-76 Compilation of Important Exhibits and Statutes, Deposition Testimony of Dr. Robert K. Shannon.
- 10-12-76 Affidavit of James J. Riley, Jr.
- 10-12-76 Affidavit of Richard Friedman.

- 10-12-76 Affidavit of Stanley Boysen.
- 10-12-76 Affidavit of Tom Creighton.
- 10-13-76 Exhibit No. 2 of Intervenor, Texas Optometric Association. Publication "There's More Than Meets The Eye".
- 11-3-76 Order signed Denying Leave to Intervene to R.E. Hughes and Dr. C.R. Buller, as Plaintiffs.
- 3-16-77 Order Pendente Lite signed by Judge Fisher 3-14-77, that Texas State Optical at 61 Parkdale Plaza, Corpus Christi, Texas, exempt from prohibitions of Section 5.13(d) of Texas Optometry Act until 60 days after final judgment by Court.
- 3-22-77 Order signed Denying Leave to Intervene by Drs. O'Hair and Milloy, as plaintiffs.
- 9-20-77 Memorandum Opinions by Judge Fisher, Judge Goldberg and Judge Steger.
- 10-4-77 Objections to Plaintiff's Proposed Final Judgment by defendants.
- 10-19-77 Memorandum of Authorities in support of Defendants' Objections to Plaintiff's Final Judgment.
- 10-27-77 Final Judgment - Found Certain Sections of the Optometry Act of Article 4552 revised Civil Statute of Texas unconstitutional and Sect. 2.02 of the act as constitutional.
- 12-20-77 Notice of Appeal to the Supreme Court of the United States, by Defendants, Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A.

- Stickssel, Jr., Dr. John W. Davis, and Dr. Salvador Mora, from portion of Final Judgment entered on October 27, 1977.
- 12-21-77 Bond for Costs on Appeal, by Defendants, Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Stickssel, Jr., Dr. John W. Davis, and Dr. Salvador Mora, in the amount of \$250.00.
- 12-21-77 Notice of Appeal to the Supreme Court of the United States, by Plaintiff, Dr. N. Jay Rogers, from portion of Final Judgment entered on October 27, 1977.
- 12-21-77 Notice of Appeal to the Supreme Court of the United States, by Intervenor, W.J. Dickinson, from portion of Final Judgment entered on October 27, 1977.
- 12-23-77 Bond for Costs on Appeal, in the amount of \$250.00, by Plaintiff, Dr. N. Jay Rogers and Intervenor, W.J. Dickinson.
- 12-22-77 Notice of Appeal to the Supreme Court of the United States, by Intervenor, Texas Optometric Association, Inc., from portion of Final Judgment entered on October 27, 1977.
- 12-23-77 Appeal Bond for Costs in the amount of \$250.00 for Intervenor, Texas Optometric Association, Inc.
- 12-30-77 Three Judge Hearing at Beaumont, Texas on February 20, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED

U.S. District Court
Eastern District of Texas

AUG 25 1975

MURRAY L. HARRIS, CLERK
BY
DEPUTY Beatrice H. Bryan

DR. N. JAY ROGERS

VS.

DR. E. RICHARD
FRIEDMAN, ET AL

§
§
§
§
§
§
§

CIVIL ACTION NO.
B-75-277-CA

COMPLAINT

TO THE HONORABLE UNITED STATES
DISTRICT JUDGE:

COMES NOW DR. N. JAY ROGERS hereinafter called plaintiff, complaining of DR. E. RICHARD FRIEDMAN, O. D., DR. PHILIP LEWIS, O.D., DR. JOHN B. BOWEN, O.D., DR. HUGH A. STICKSEL, JR., O.D., and DR. SALVADOR S. MORA, O.D., hereinafter called defendants, and for cause of action would show:

A TRUE COPY I CERTIFY
MURRAY L. HARRIS, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS

BY: Beatrice H. Bryan

ONE: PLAINTIFF

Plaintiff is a resident citizen of Beaumont, Jefferson County, Texas, within the Eastern District of Texas. He is a licensed optometrist and a member of the Texas Optometry Board.

TWO: DEFENDANTS

Defendant, Dr. E. Richard Friedman, O.D., is a resident of Dallas, Texas; defendant, Dr. Philip Lewis, O.D., is a resident of Houston, Texas; defendant, Dr. John B. Bowen, O.D., is a resident of Lubbock, Texas; defendant, Dr. Hugh A. Stickse, O.D., is a resident of Amarillo, Texas and defendant, Dr. Salvador S. Mora, O.D., is a resident of Laredo, Texas. Each of said defendants is a member of the Texas Optometry Board as same is defined by Article 4552 et seq., Revised Civil Statutes of Texas, and are sued individually and in their official capacity as members of the Texas Optometry Board.

THREE: JURISDICTION

The Court has jurisdiction under the Vth, VIth, and XIVth Amendments to the Constitution of the United States, together with 28 U.S.C. 1331, 28 U.S.C. §2201, 42 U.S.C. §1983, 28 U.S.C. §2281 and 28 U.S.C. §2284.

FOUR: CAUSE OF ACTION

I.

Make-Up of Board

Plaintiff is a licensed optometrist practicing his profession in the State of Texas and has done so since 1939. He practices in association with a number of other licensed optometrists under the trade name Texas State Optical and "TSO".

The Texas Optometry Act was adopted in 1969 as Article 4552-1.01 et seq.¹ Created thereunder is the Texas Optometry Board, which is composed of six (6) members. The Act prescribes:

"At all times there shall be a minimum of two-thirds of the Board who are members of a State Optometric Association which is recognized by and affiliated with the American Optometric Association". §2.02.

The only body in Texas "which is recognized by and affiliated with the American Optometric Association" is the Texas Optometric Association. Hence, four members of the Texas Optometry Board as it is presently constituted, are members of the Texas Optometric Association. Membership in said Association has been denied to and is not available to plaintiff.

For a number of years the Texas Optometric Association, its officers, and membership has exerted a full scale campaign to exert legal, political and financial pressure upon plaintiff and his associates in the practice of optometry to repress plaintiff and his type of optometric practice. This effort by the Texas Optometric Association and its membership has been in the Legislative Halls, the Courts of multiple counties, the Executive offices and Administrative agencies of the State of Texas, for the economic gain of defendants and those who are members of the Texas Optometric Association.

The membership of the Texas Optometric Association spent money and substantial lobby efforts to have adopted the Texas Optometry Act in 1969.

¹Further references to the Act will be merely to the section, i.e. Section 1.01, without reference to the Article (4552-Revised Civil Statutes of Texas).

Two-thirds of the membership of the Texas Optometry Board, created by said Act, are required by law to be members of the Texas Optometric Association.

Defendants herein, Dr. Friedman, Dr. Bowen, Dr. Stickse and Dr. Lewis, are all members of the Texas Optometric Association and the Texas Optometry Board.

Defendants, Dr. Lewis and Dr. Friedman, have in the past occupied various and sundry offices within the Texas Optometric Association including the office of President and Vice President.

There are 1,100 optometrists licensed to practice within the State of Texas. Only 450 or so are dues paying members of the Texas Optometric Association. Thus more than a majority of the optometrists are regulated by a factional minority who have legal control and exert full control over the Board and all of its interpretative and regulatory acts.

Such make-up of the Board deprives your plaintiff of constitutional equal protection, and due process; deprives dispensing opticians, who are regulated by the Board but given no representation upon it of equal protection; and deprives members of the public at large of equal protection in that there is no public member upon this regulatory body.

Plaintiff would show that §2.02 of the Act because of the denial of due process, the fatally defective bias of a majority of the Board, the absence of a dispensing optician upon the Board, and the absence of a public member thereupon, is unconstitutional and should be so declared by this Court.

FOUR: CAUSE OF ACTION

II.

Trade Name

A. The Texas Optometry Act states:

"1. The 'practice of optometry' is defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision" §1.02(1)

The practice of optometry may be conducted either by a licensed optometrist (OD) or a licensed physician or surgeon (M.D. or D.O.). Texas Attorney General Opinion No. V-860 (1949).

Likewise, the Act specifically provides that "the fitting of contact lens shall be done only by a licensed physician or optometrist as defined by the laws of this state" §1.02(3)(A)

B. The Act provides:

"No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry any assumed name, corporate name, tradename, or any name other than the name under which he is licensed to practice optometry in Texas;" §5.13(d)

C. For more than twenty-five (25) years prior to the adoption of the Texas Optometry Act, plaintiff, in partnership with others, has practiced optometry under the tradename Texas State Optical. He continues to do so in some of his offices under an exemption or "grandfather clause" contained in the Act. However, the

exemption is of limited duration and does not afford plaintiff any constitutional protection.

Meanwhile, other of the health care professionals---physicians and surgeons licensed to practice medicine in this State---are under no such proscription from *practicing optometry* under an assumed name or tradename other than the name under which he is licensed, and are in fact practicing optometry under such names in direct competition with your plaintiff.

D. The statutory scheme which allows one and prohibits another profession from *practicing optometry* under an assumed name is an arbitrary and capricious scheme, not reasonably or rationally related to any legitimate regulatory purpose of the State. This invidious discrimination is State action which violates plaintiff's assurance of equal protection and due process under the XIVth Amendment to the Constitution of the United States.

III.

Restraint of Trade

A Section 5.15(e) provides:

"If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lens according to the optometrist prescription: First, that the optometrist will prepare or have the lenses prepared according to the prescription; and Second, that the patient may have the prescription filled by any dispensing optician (*not naming or*

suggesting any particular dispensing optician) but should return for an optometrical examination of the lens. If the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician for selection of frames and filling the prescription."

B. Most optometrists in Texas "fill their own prescriptions for eye glasses and contact lenses" and when they do, they act as dispensing opticians. The dispensing optician "is an artisan qualified to fill prescriptions and fit frames".

C. Section 5.15(e) unreasonably discriminates between (1) the optometrist who prepares his own prescription or has the lenses prepared according to the prescription, and (2) the optometrist who does not; because it prevents the optometrist from recommending a particular dispensing optician to prepare the prescription.

D. Section 5.15(e) unreasonably discriminates between the optometrist and the physician (M.D. or D.O.) who practices optometry, because the optometrist cannot freely refer a patient to a dispensing optician and the physician is under no such restriction.

E. Section 5.15(e) unreasonably discriminates between the optician who is not also an optometrist and the optician who is also an optometrist because it prevents the optician from being recommended freely to prepare a prescription.

F. Such prohibition is invidious discrimination violative of the 1st Amendment and the Equal Protection Clause of the XIVth Amendment to the Constitution of the United States.

IV.

The Act, §4.04(10), provides that the Board may revoke or suspend the operation of any license if it finds that the licensee has "willfully or repeatedly violated any of the provisions" of the Act, and makes each day's violation a criminal misdemeanor offense. §5.18 Thus, plaintiff, restricted and constrained in violation of his constitutional rights, must either forego the expression of his right or risk revocation or suspension proceedings with respect to his license.

V.

Prayer

WHEREFORE, PREMISES CONSIDERED, plaintiff prays:

1. Defendants be cited to appear and answer herein.
2. The Court convene a three judge district court in accordance with 28 U.S.C. §2281 and 28 U.S.C. §2284.
3. That the full Court declare §§2.02, 5.13(d) and 5.15(e) of the Texas Optometry Act (Article 4552, Revised Civil Statutes of Texas), violative of the free speech and Equal Protection Provisions of the XIVth Amendment to the Constitution of the United States.
4. That the full Court permanently enjoin defendants and their successors in office from enforcing the provisions of Article 4552, §§2.02, 5.13(d) and 5.15(e) of the Texas Optometry Act.
5. That plaintiff have judgment for costs of Court and such other and further relief as is just, at law or in equity.

A-16

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Plaintiff

By s/s
 Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

A-17

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS)	
)	
V.)	
)	
DR. E. RICHARD)	CIVIL ACTION NO.
FRIEDMAN, DR. JOHN)	B-75-277-CA
W. DAVIS, DR. JOHN B.)	
BOWEN, DR. HUGH A.)	
STICKSEL, JR.. AND DR.)	
SALVADOR S. MORA)	

**DEFENDANTS' SECOND AMENDED ANSWER
TO THE SAID HONORABLE COURT:**

Defendants above named, in accordance with Rule 15(a) of the Rules of Civil Procedure, amend their answer in the above entitled cause so that the same will read as follows:

1. Defendants admit the allegations of paragraph 1 of the complaint.
2. Defendants admit the allegations of paragraph 2 of the complaint except for the allegation that Defendant Dr. Philip Lewis is a member of the Texas Optometry Board which is specifically denied.
3. Defendants deny that this action arises under the Constitution of the United States and deny that there has been any threatened deprivation under color of any status of the State of Texas of any rights, privileges or immunities secured to the Plaintiff or others similarly situated by the Constitution of the United States.

4. Defendants admit the allegations of paragraph 4 I., subparagraph 1 of the complaint.

5. Defendants admit the allegations of paragraph 4 I., subparagraph 2 of the complaint.

6. Defendants admit that the Texas Optometric Association is recognized by and affiliated with the American Optometric Association as alleged in paragraph 4 I., subparagraph 3 of the complaint.

7. Defendants admit that four members of the Texas Optometry Board, as it is presently constituted, are members of the Texas Optometric Association as alleged in paragraph 4 I., subparagraph 3 of the complaint.

8. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegation of paragraph 4 I., subparagraph 3 of the complaint that membership in said Association has been denied to and is not available to Plaintiff.

9. Defendants deny the allegations of paragraph 4 I., subparagraph 4 of the complaint.

10. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 I., subparagraph 5 of the complaint.

11. Defendants admit the allegations of paragraph 4 I., subparagraph 6 of the complaint.

12. Defendants admit the allegations of paragraph 4 I., subparagraph 7 of the complaint except for the allegation that Dr. Lewis is a member of the Texas Optometry Board which is specifically denied.

13. Defendants admit the allegations of paragraph 4 I., subparagraph 8 of the complaint.

14. Defendants deny the allegations of paragraph 4 I., subparagraph 9 of the complaint.

15. Defendants deny the allegations of paragraph 4 I., subparagraph 10 of the complaint.

16. Defendants deny the allegations of paragraph 4 I., subparagraph 11 of the complaint.

17. Defendants admit the allegations of paragraph 4 II., subparagraphs A. 1, 2 and 3 of the complaint.

18. Defendants admit the allegations of paragraph 4 II., subparagraph B of the complaint.

19. Defendants admit the allegations of paragraph 4 II., subparagraph C 1 of the complaint.

20. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 II., subparagraph C 2 of the complaint.

21. Defendants deny the allegations of paragraph 4 II., subparagraph D of the complaint.

22. Defendants admit the allegations of paragraph 4 III., subparagraph A of the complaint.

23. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 III., subparagraph B of the complaint.

24. Defendants deny the allegations of paragraph 4 III., subparagraph C of the complaint.

25. Defendants deny the allegations of paragraph 4 III., subparagraph D of the complaint.

26. Defendants deny the allegations of paragraph 4 III., subparagraph E of the complaint.

27. Defendants deny the allegations of paragraph 4 III., subparagraph F of the complaint.

28. Defendants deny the allegations of paragraph 4 IV., of the complaint.

DEFENSES

1. The complaint fails to state a claim against Defendants upon which relief can be granted.

2. The venue of the action made a basis of the complaint does not lie in the United States District Court for the Eastern District of Texas under 28 U.S.C. Section 1391(b).

3. Plaintiff lacks the requisite standing necessary to challenge the constitutionality of the Texas Optometry Act.

4. Assuming, arguendo, that Plaintiff has standing to prosecute this suit, he has waived such standing by accepting a position and serving on the Texas Optometry Board.

5. Plaintiff is estopped from challenging the constitutionality of the Texas Optometry Act by virtue of his sponsoring and procuring its enactment and by enforcing its provisions.

Wherefore, Defendants pray that the complaint of the Plaintiff be dismissed with costs to the Defendants.

ORGAIN, BELL & TUCKER
Beaumont Savings Bldg.
Beaumont, Texas 77701
(713) 838-6412

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

ELIZABETH LEVATINO
Assistant Attorney General

BY: _____
JOHN TUCKER

ATTORNEY FOR DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES

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ATTORNEYS FOR DEFENDANTS IN THEIR OFFICIAL CAPACITIES

BY: _____
JOE R. GREENHILL, JR.

OF COUNSEL

CERTIFICATE OF SERVICE

(omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	B-75-277-CA
	§	
DR. E. RICHARD	§	
FRIEDMAN, DR. JOHN	§	
W. DAVIS, DR. JOHN B.	§	
BOWEN, DR. HUGH A.	§	
STICKSEL, JR., AND DR.	§	
SALVADOR S. MORA	§	

MOTION TO INTERVENE

TO THE HONORABLE UNITED STATES
DISTRICT COURT:

Now come the Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as President of said Chapter, and move this Honorable Court for leave to intervene in the captioned civil action. In support hereof, Movants would show unto the Court the following:

I.

This Motion is filed pursuant to F. R. Civ. P. 24 (a) (2), in that your applicants claim interests relating to the subject matter of the main action, and said applicants are so situated that this action's disposition may impair or impede--in a practical sense--your applicants' ability to protect their interests. Furthermore, your applicants would show that their interests are not adequately protected by existing parties. Accordingly, your applicants claim a right to intervene herein, as a matter of right.

II.

In the alternative, Movants pray the Court grant them leave to intervene as a matter of permission and discretion under F. R. Civ. P. 24 (b) (2), in that Movants' Complaint in Intervention, attached hereto, presents questions of law and fact in common with the main action.

III.

The Texas Senior Citizens Association, Port Arthur, Texas Chapter, hereby requests leave to intervene *qua* Association and Chapter. The Texas Senior Citizens Association is a statewide, non-profit corporate organization composed of sixty-three local chapters in the state of Texas. The Port Arthur, Texas Chapter has a membership of approximately 1,100 individuals. Most are wearers and consumers of corrective lenses or eyeglasses. The members are persons of retirement age who rely primarily on Social Security and fixed incomes for economic subsistence. Said Chapter's headquarters and office are located at 910 DeQueen Street, Port Arthur, Texas. Said Chapter's President is Mr. W. J. Dickinson. Mr. Dickinson resides at 3748 Seventh Street, Port Arthur, Texas. The Secretary is Mrs. Elizabeth Terry of Port Arthur, Texas.

IV.

Movants, the Port Arthur Chapter and Mr. Dickinson, would show unto the Court that said Chapter and Association were founded and continue to exist so that their members--retirement-age individuals on fixed incomes--may associate with one another for the purposes of acquiring information of interest to their mode of living in terms of the costs of goods and services, the reasons for such costs, the monitoring of the availability of goods and services in the market place,

and the communication of the foregoing information among the membership and throughout a democratic society. Included within the items goods and services whose costs and availability are of acute interest to Movants are the costs and availability of optometric and optical services in the state of Texas.

V.

By their Complaint in Intervention, attached hereto, and by competent proof, Movants would show unto the Court that certain sections of the Texas Optometry Act, Tex. Rev. Civ. Stat. Ann. art. 4552-1 *et seq.*, violate Movants' rights to acquire valuable information in a free society, as guaranteed by the First Amendment of the United States Constitution. Correspondingly, inasmuch as the Port Arthur Chapter exists so that its members may obtain information and engage in communicative association relative to, *inter alia*, the items complained of in the main suit and in Movants' Complaint in Intervention, the First Amendment rights of said Chapter's members may properly be asserted and vindicated by according standing to the Chapter and its President. Moreover to allow intervention by said Chapter and its President would permit the issues raised by the Complaint in Intervention, and by the main suit, to be resolved in a single proceeding, thus reducing the potential for a multiplicity of suits.

VI.

Movants would further represent to the Court that allowance of the intervention prayed herein will not operate to complicate or unduly prolong the trial of the merits. The issues sought to be raised by Movants can be resolved almost entirely, if not entirely, by reference to the proofs to be offered in the main suit. Furthermore, the intervention will not prejudice the Defendants or take them by surprise, for Defendants are fully familiar

with the bulk of the evidence, which is contained in depositions already taken, at which Defendants were represented by counsel. The substantive issues relating to price and other advertising sought to be raised by Movants in addition to those issues already raised by the main plaintiff were fully explored during the depositions. No prejudice or unfair surprise will result to any party by the allowance of the intervention prayed herein. Further, Movants anticipate no need for additional discovery.

VII.

Finally, the granting of Movants' application to intervene will, instead of complicating the issues, greatly simplify their presentation and resolution. More specifically, Defendants have asserted, by their Motion to Dismiss, that the main Plaintiff, Dr. Rogers, lacks standing to challenge § 5-15(e) of the Texas Optometry Act, which limits the optometrist's ability to refer patients to particular dispensing opticians. Defendants assert that, since the Texas Optometry Board has not threatened Plaintiff with disciplinary action under said section, Plaintiff therefore lacks standing to challenge its constitutionality. Further, Defendants have contested main Plaintiff Dr. Rogers' standing to challenge the absence of a public citizen on the Board, since he is not a public citizen as such, but rather a licensed optometrist who, in fact, serves on the Board.

Suffice it to say that these issues of standing, as raised by Defendants, involve somewhat murky inquiries into the case law precedents and the actual facts of this lawsuit. Movants, however, respectfully submit that *they* unquestionably have standing to raise First Amendment issues on the price advertising, referral and public member matters. See *Technical-Hudson Electronics, Inc. v. Dept. of Consumer Affairs*,

(C.D.Cal.), 44 U.S.L.W. 2337 (3-Judge Court); *Virginia Citizens Consumer Council v. State Board of Pharmacy*, E.D.Va. 1974, 373F.Supp. 683 (3-Judge Court), appeal pndg. By their Complaint in Intervention, Movants allege that the above items directly abridge their First Amendment rights as consumers and as citizens who associate for consumer-oriented purposes. Accordingly, the granting of intervention to Movants will conserve, rather than waste, the Three Judge Court's valuable time.

In addition, unless Movants are allowed to intervene, the whole question whether their First Amendment issues shall be heard will turn on whatever resolution the Court makes of the questions relating to the main Plaintiff's standing. Those questions are not easily answered. Therefore, to disallow Movants' application may, *as a practical matter*, impair or impede Movants' interests which are not adequately protected by the main Plaintiff alone.

WHEREFORE, PREMISES CONSIDERED, Movants Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as President of said Chapter, respectfully pray the Court grant this application for intervention, accept the filing of the Complaint in Intervention, and for general relief.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOLIN
Attorneys for Plaintiff.

By _____ s/s _____
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

An exact copy of this motion has been properly mailed to counsel for Defendants, on this the 17 day of February, 1976, by placing same in the United States Mail, properly addressed and postage prepaid.

S/S

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
VS.	§	CIVIL ACTION NO.
	§	B-75-277-C.A.
DR. E. RICHARD	§	
FRIEDMAN, DR. JOHN	§	
W. DAVIS, DR. JOHN B.	§	
BOWEN, DR. HUGH A.	§	
STICKSEL, JR. AND DR.	§	
SALVADOR S. MORA	§	

COMPLAINT IN INTERVENTION

TO THE HONORABLE UNITED STATES
DISTRICT COURT:

NOW COME the Texas Senior Citizens Association, Port Arthur, Texas, Chapter, and W. J. Dickinson, individually and as President of said Chapter (hereinafter referred to as "intervenor-Plaintiffs"), and file this, their Complaint in Intervention. Intervenors would respectfully show unto the Court the following:

I.

JURISDICTION

By virtue of leave granted by the Court, this Complaint in Intervention is filed pursuant to F.R. Civ. P. 24. This is a civil action pending before the Honorable Three-Judge Court, whose jurisdiction is conferred by 28 U.S.C. §§1331, 1343(3) and (4), 2201, and 2281, et seq. The claims for relief presented herein are stated pursuant to 42 U.S.C. §§1983 and the First and

Fourteenth Amendments of the United States Constitution.

II.

THE PARTIES

Intervenor-Plaintiff Port Arthur Chapter of the Texas Senior Citizens Association is a member organization in good standing of the Texas Senior Citizens Association, a non-profit Texas corporation composed of sixty-three local chapters in this state. The Port Arthur Chapter has a membership of approximately 1,100 retirement age persons, most of whom are wearers and consumers of corrective lenses and eyeglasses purchased within the State of Texas. The Port Arthur Chapter's headquarters and office are located at 910 DeQueen Street, Port Arthur, Texas. Its President is Intervenor-Plaintiff Mr. W. J. Dickinson, of 3748 Seventh Street, Port Arthur, Texas. Its Secretary is Mrs. Elizabeth Perry, of Port Arthur, Texas.

Founded in 1965, the Port Arthur Chapter exists for the purpose, among others, of uniting retired and fixed-income persons so that they may better inform themselves, and through their united efforts acquire useful knowledge, concerning the cost to the low and fixed-income citizen of goods and services in a society plagued by constantly escalating consumer prices. To those ends, the members of the Port Arthur Chapter gather information, associate with each other concerning the information gathered, and communicate and disseminate information throughout the membership and throughout the community, relative to the consumer costs of goods and services. A matter of particularly acute concern to said Chapter's members, since most are directly affected thereby, is the retail cost of prescription eyewear. This concern includes both the

examining-prescribing aspect of the prescription eyewear business, and the dispensing opticianry aspect. The members of the Port Arthur Chapter seek out and gather information, and collectively associate for the purpose of communicating pertinent information regarding the cost and availability of prescription eyewear among the membership and in the community. One of the principal objectives of this association and communication, for which the Chapter itself serves as a gathering place and clearinghouse for the members, is the identification of sources for reasonably-priced and readily available prescription eyewear goods and services. The Port Arthur Chapter, through its membership, endeavors to encourage greater availability of reasonably priced prescription eyewear; obtains and provides information pertinent to that objective; and exercises collective influence in government and in the marketplace in order to eliminate artificial and arbitrary barriers, in the laws and elsewhere, which tend to perpetuate self-serving economic interests at the expense of low and fixed-income prescription eyewear consumers.

Intervenor-Plaintiff Mr. W. J. Dickinson, President of the Port Arthur Chapter, shares the foregoing purposes, goals, and objectives of the Chapter and its members. Like most of the Chapter's members, he, too, is a wearer and consumer of prescription lenses and eyeglasses purchased within the State of Texas.

The defendants, for purposes of this intervention, are the same five members of the Texas Optometry Board who are the defendants in the main suit filed by Dr. N. Jay Rogers.

III.

FIRST CAUSE OF ACTION**Advertising by Optometrists**

A. Section 5.09(a) of the Texas Optometry Act, Tex. Rev. Civ. Stat. Ann., Art. 4552-5.09, which is administered and enforced by the Texas Optometry Board, provides as follows:

"Section 5.09. Advertising by Optometrists. (a) No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials, or any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles, or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, gifts, or any statements or advertisements of a similar nature, import, or meaning."

The foregoing section absolutely prohibits optometrists in Texas from advertising "any price offered or charged . . . for any ophthalmic services or materials" in the name of the optometrist. The foregoing section directly affects intervenors-plaintiffs, and causes them direct injury-in-fact, because it deprives them of valuable and useful information concerning the cost to the consumer of ophthalmic goods and services in the State of Texas. Intervenor-plaintiffs affirmatively allege that they would patronize those optometrists who provide the best services and materials for the lowest

price, if such optometrists could be identified through advertising. Such identification, however, is directly precluded by §5.09(a), and accordingly intervenors-plaintiffs are deprived of true factual information concerning comparative pricing and availability of prescription eyewear. This deprivation violates intervenors-plaintiffs' rights under the First and Fourteenth Amendments, and controlling decisions of the Supreme Court of the United States. Therefore, §5.09(a) is unconstitutional, and its enforcement is due to be permanently enjoined by this Court.

B. Furthermore, as retail consumers of prescription ophthalmic goods and services, and as persons whose constitutional rights are violated by §5.09(a)'s prohibition of advertising by optometrists, intervenors-plaintiffs affirmatively allege that §5.09(b) together with §5.10 of the Act arbitrarily and invidiously discriminate between optometrists who own, operate, or manage a dispensing opticianry and those who do not. Specifically, the former class of optometrists are permitted to advertise, *in the name of their opticianries only*, by obtaining an advertising permit under §5.10. The latter class of optometrists, however, are prohibited from doing, or knowingly permitting, *any* advertising of their goods and services. Sections 5.09(b) and 5.10, in pertinent part, read as follows:

"Section 5.09. Advertising by Optometrists. ... (b) This section shall not operate to prohibit optometrists who also own, operate, or manage a dispensing opticianry from advertising in any manner permitted under any section of this bill so long as such advertising is done in the name of the dispensing opticianry and not in the name of the optometrist in his professional capacity.

"Section 5.10. Advertising by Dispensing Opticians. (a) No person, firm or corporation shall

publish or display or cause or permit to be published or displayed in any newspaper or by radio, television, window display, poster, sign, billboard or any other means or media any statement or advertisement concerning ophthalmic lenses, frames, eyeglasses, spectacles or parts thereof which is fraudulent, deceitful or misleading, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning.

"(b) No person, firm or corporation shall publish or display or cause or permit to be published or displayed in any newspaper, or by radio, television, window display, poster, sign, billboard or any other means or media, any statement or advertisement of or reference to the price or prices of any eyeglasses, spectacles, lenses, contact lenses or any other optical device or materials or parts thereof requiring a prescription from a licensed physician or optometrist unless such person, firm or corporation complies with the provisions of Subsections (c)-(j) of this section.

"(c) The person, firm or corporation shall obtain from the board an "Advertising Permit", which permit shall be granted to any person, firm or corporation which is engaged in the business of a dispensing optician in Texas."

The above-described arbitrary and invidious discrimination between two classes of optometrists again violates intervenors-plaintiffs' First Amendment rights to obtain valuable information, and also violates - as to those optometrists who do not own, operate, or manage a dispensing opticianry - the Fourteenth Amendment guarantees of substantive due process and

the Equal Protection of the laws. Intervenor-plaintiffs are entitled to raise the non-dispensing optometrists' Fourteenth Amendment rights, because the statutory abridgement of those rights directly dilutes and invades the professional relationships that intervenors would enter into with said optometrists, but for the arbitrary, irrational, and invidious discrimination effected by §§5.09(b) and 5.10. Accordingly, those sections are due to be permanently enjoined.

IV.

SECOND CAUSE OF ACTION

Restraint of Trade

Section 5.15(e) provides:

"If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lens according to the optometrist prescription: First, the optometrist will prepare or have the lenses prepared according to the prescription; and second, that the patient may have the prescription filled by any dispensing optician (*not naming or suggesting any particular dispensing optician*) but should return for an optometrical examination of the lens. If the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician for selection of frames and filling the prescription."

Most optometrists in Texas "fill their own prescriptions for eye glasses and contact lenses" and when they do, they act as dispensing opticians. The dispensing optician "is an artisan qualified to fill prescriptions and fit frames."

Section 5.15(e) unreasonably discriminates between (1) the optometrist who prepares his own prescription or has the lenses prepared according to the prescription, and (2) the optometrist who does not; because it prevents the optometrist from recommending a particular dispensing optician to prepare the prescription.

Section 5.15(e) unreasonably discriminates between the optometrist and the physician (M. D. or D. O.) who practices optometry, because the optometrist cannot freely refer a patient to a dispensing optician and the physician is under no such restriction.

Section 5.15(e) unreasonably discriminates between the optician who is not also an optometrist and the optician who is also an optometrist because it prevents the optician from being recommended freely to prepare a prescription.

Such prohibition is invidious discrimination violative of the First Amendment and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

Said prohibition violates intervenors-plaintiffs' First Amendment rights in that, once again, it deprives them of valuable information relative to the identity and location of firms where they could have their prescriptions filled. It also denies them their First Amendment right to receive information in the sense that *if* the optometrist who does not fill his own prescriptions *could* freely refer patients to dispensing opticians, then the patients would obtain valuable and useful information regarding the interests and motives - financial or otherwise - of their optometrists. To eliminate the arbitrary and unreasonable restriction on referrals would cause dispensing opticians to offer their goods and services on a more competitive basis, thus enhancing every optometrist's responsibility to his

patients to identify the most economical sources of quality prescription materials, rather than referring his patients to himself, as is commonly done by most Texas optometrists who fill their own prescriptions. Because §5.15(e) once more dilutes and prevents professional and commercial relationships that would exist but for the section's arbitrary distinctions, intervenors-plaintiffs are entitled to raise not only their own First Amendment rights, but also the Fourteenth Amendment rights of those optometrists against whom the section discriminates - namely, those who do not prepare, or attend to the preparation of, their own prescriptions. Section 5.15(e) therefore, should be permanently enjoined.

V.

Trade Name

For the most part, this cause of action is adequately set forth by paragraph "FOUR", part II, of the Complaint filed by the main plaintiff, Dr. N. Jay Rogers, which paragraph is adopted herein by reference thereto. In addition, however, intervenors-plaintiffs affirmatively allege that the prohibition of §5.13(d) against the practice of optometry under trade name violates intervenors-plaintiffs' First Amendment rights to receive valuable information about the prices and availability of prescription eyewear. Specifically, the prohibition contained in §5.13(d) frustrates and precludes the economies of scale that would inure to the benefit of prescription eyewear consumers, if optometry could be practiced under trade name by those licensed optometrists who elected to do so. A trade name is a form of communication and information to the public in the sense that it conveys to the public connotations of the cost, nature, and quality of a particular source's product or service. In that respect, the use of a trade name is

analogous to advertising. Yet the use of a trade name for the practice of optometry is forbidden by §5.13(d). Since this prohibition deprives intervenors-plaintiffs of valuable information about the cost, nature, and quality of prescription eyewear services and materials offered by particular optometrists, it violates their First Amendment rights and should be permanently enjoined by the Court.

VI.

FOURTH CAUSE OF ACTION**Make-Up of Board**

Intervenors-plaintiffs respectfully adopt by reference all of paragraph "FOUR", part I, of the Complaint filed by main plaintiff Dr. N. Jay Rogers. Intervenors-plaintiffs affirmatively allege, and would show, that §2.02 of the Act, which vests the Texas Optometric Association with a perpetual supermajority control over the regulation of optometry in Texas, violates intervenors-plaintiffs' constitutional rights in the following respects:

First, it violates their rights under the First Amendment and the procedural and substantive aspects of the Fourteenth in that it makes no allowance for a public citizen on the Texas Optometry Board. As non-professional members of the public-at-large, intervenors-plaintiffs have standing to raise this issue.

Second, by vesting the Texas Optometric Association with the above-described supermajority control, §2.02 effectively converts into state action and state policy certain tenets or codes of practice followed by the members of the Texas Optometric Association, and prescribed by the American Optometric Association. Many of these tenets or codes are flagrantly

monopolistic and anticompetitive - for example, those that limit the number of professional practices in which an optometrist may own an interest and those that directly and indirectly forbid advertising by optometrists. There is no rational basis whatever for the Texas legislature's explicit and implicit action in the foregoing respects.

Third, §2.02's implicit canonization of the Texas Optometric Association's tenets and codes operates, with respect to intervenors-plaintiffs, as state action abridging their fundamental rights to receive valuable and useful information, as guaranteed by the First and Fourteenth Amendments.

Fourth, this state action again dilutes and frustrates the professional and commercial relationships that intervenors-plaintiffs would enjoy with many Texas optometrists but for the anticompetitive policies which are fostered into official state policy by virtue of the Texas Optometric Association's (and, in turn, the American Optometric Association's) extraordinary majority control of the regulating board. Accordingly, intervenors-plaintiffs are entitled not only to raise their First Amendment issues, but also the substantive and procedural Due Process issues and the Equal Protection issues already raised by Dr. Rogers.

In summary, intervenors-plaintiffs respectfully urge and pray the Court permanently enjoin §2.02, for it is unconstitutional on its face and as applied, under the First and Fourteenth Amendments of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, intervenors-plaintiffs respectfully pray the Court declare unconstitutional and permanently enjoin the enforcement of §§5.09(a) and (b), 5.10, 5.13(d), 5.15(e), and 2.02 of the Texas Optometry Act, and for such further relief as is just, at law or in equity.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN

By s/s
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

CERTIFICATE OF SERVICE

I do hereby certify that an exact copy of the above and foregoing Complaint in Intervention has been served upon all interested counsel on this, the 17 day of February, 1976.

 s/s

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	B-75-277-CA
	§	
DR. E. RICHARD	§	
FRIEDMAN, DR. JOHN	§	
W. DAVIS, DR. JOHN B.	§	
BOWEN, DR. HUGH A.	§	
STICKSEL, JR. AND DR.	§	
SALVADOR S. MORA	§	

RENEWED MOTION TO INTERVENE

TO THE HONORABLE UNITED STATES
DISTRICT COURT:

COME NOW the Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as president of said Chapter, and make this their renewed motion for leave to intervene in the captioned civil action. In support hereof, movants would show unto the Court the following:

1.

On or about February 15, 1976, movants filed their original motion to intervene in this action, accompanied by their complaint in intervention. On February 18, 1976, the honorable Chief Judge Fisher of this Court entered an order denying leave to intervene at that time, but without prejudice to the renewal of said motion at a later date. A true copy of said order is attached to this renewed motion.

2.

This motion is made pursuant to F. R. Civ. P. 24 (a)(2) in that your movants claim interest relating to the subject matter of the main action, and said applicants are so situated that this action's disposition may impair or impede -- in a practical sense -- your applicants' ability to protect their interests. Furthermore, your applicants would show that their interests are not adequately protected by existing parties. In the alternative, movants pray the Court grant them leave to intervene as a matter of permission and discretion under F.R. Civ.P.24(b)(2), in that movants' complaint in intervention, on file herein, presents questions of law and fact in common with the main action.

3.

Movants represent unto the Court that allowance of the intervention prayed herein will not operate to complicate or prolong the trial of the merits. The issues sought to be raised by movants can be resolved almost entirely, if not entirely, by reference to the proofs to be offered in the main suit. Furthermore, intervention will not prejudice the defendants or take them by surprise. Further, movants anticipate no need for additional discovery, or for additional delay.

4.

Movants represent unto the Court that the granting of intervention will not complicate the issues, but instead will greatly simplify their presentation and resolution. Furthermore, the granting of intervention will assure that the interests of the public, which lie at the heart of this action, will be represented.

WHEREFORE, PREMISES CONSIDERED,
movants Texas Senior Citizens Association, Port

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOLIN
Attorneys for Plaintiff

By _____
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

CERTIFICATE OF SERVICE
(omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS)	
VS.)	
)	
DR. E. RICHARD)	CIVIL ACTION NO.
FRIEDMAN, DR. JOHN)	B-75-277-CA
W. DAVIS, DR. JOHN B.)	
BOWEN, DR. HUGH A.)	
STICKSEL, JR., AND DR.)	
SALVADOR S. MORA)	

**DEFENDANTS' MOTION TO DISMISS AND
DEFENDANTS' ANSWER TO COMPLAINT IN
INTERVENTION**

I.

Defendants move that this Court, pursuant to Rule 12, F.R.C.P., dismiss the Complaint in Intervention filed by the Texas Senior Citizens Association, Port Arthur, Texas Chapter and W. J. Dickinson, individually and as President of said chapter for the reasons that Intervenor's lack the requisite standing to prosecute this suit.

II.

Subject to any motions to dismiss previously filed, Defendants file this answer in response to the Complaint in Intervention previously filed by the Texas Senior Citizens Association, Port Arthur, Texas Chapter, and W. J. Dickinson, individually and as President of said chapter:

1. Defendants deny that this action arises under the constitution of the United States and deny that there has been any threatened deprivation under color of any statute of the State of Texas of any rights, privileges or immunities secured to the Plaintiff or others similarly situated by the Constitution of the United States.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the first, second and third paragraphs under section II of the complaint in intervention.

3. Defendants admit the allegations in the fourth (last) paragraph under section III A.

4. Defendants admit the allegations in the first paragraph under section III A.

5. Defendants deny the allegations in the second (last) paragraph under section III A.

6. Defendants deny all the allegations in subsection B under section III, except for the quoting of the pertinent sections of the statute.

7. Defendants deny all the allegations under section IV, except for the quoting of the pertinent section of the statute.

8. Defendants deny all the allegations in section V of the complaint.

9. Defendants deny all of the allegations under section VI of the complaint.

WHEREFORE, Defendants pray that the Intervenor take nothing by this suit, and that the Court award to the Defendants their costs and for such other relief to which they may be entitled.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

RICHARD ARNETT
Assistant Attorney General

s/s

DOROTHY PRENGLER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-4721

ATTORNEYS FOR DEFEN-
DANTS IN THEIR OFFICIAL
CAPACITIES

s/s

JOHN TUCKER

ATTORNEY FOR DEFEN-
DANTS IN THE INDIVIDUAL
CAPACITIES

CERTIFICATE OF SERVICE
(omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
VS.	§	CIVIL ACTION NO.
		B-75-277-CA
DR. E. RICHARD	§	(THREE JUDGE
FRIEDMAN, DR. JOHN	§	COURT)
W. DAVIS, DR. JOHN B.	§	
BOWEN, DR. HUGH A.	§	
STICKSEL, JR., AND DR.	§	
SALVADOR S. MORA	§	

**PETITION OF INTERVENTION BY TEXAS
OPTOMETRIC ASSOCIATION, INC.**

TO THE HONORABLE COURT:

Now comes the Texas Optometric Association, Inc. (hereinafter referred to as Intervenor TOA) and files its Petition in Intervention in the above captioned civil action. Intervenor TOA has heretofore filed its motion for leave to amend, stating the reasons therefore and the consent by all parties to the case.

I.

Intervenor TOA is a non-profit Texas Corporation, having a membership of over 500 optometrists licensed in Texas.

II.

This Petition in Intervention is filed pursuant to F. R. Civ. P. 24 (a)(2). All parties of record, by and through their counsel, have agreed to this Intervention, as set forth in Intervenor TOA's Motion for Leave to Intervene.

III.

Intervenor TOA supports the position of Defendants on the substantive issues in this case, to-wit, that all statutes being challenged by Plaintiff N. J. Rogers and Intervenor Texas Senior Citizens Association are constitutional, both under the federal and state constitutions.

In this respect, Intervenor TOA adopts verbatim all pleadings, answers, motions and briefs heretofore filed by Defendants in their official capacity by and through their attorney of record, to-wit, the Attorney General of Texas. Such adoption of pleadings shall extend to the Attorney General's pleadings in response to complaints, motions, and briefs filed herein by the Plaintiff, Intervenor Texas Senior Citizens Association, and Intervenor Dickenson.

WHEREFORE PREMISES CONSIDERED,
Intervenor Texas Optometric Association, Inc., respectfully prays the Court grant the relief prayed for the Defendants.

Respectfully submitted,

NIEMANN & NIEMANN
1210 American Bank Tower
Austin, Texas 78701
(512-474-6901)

By s/s
Larry Niemann

CERTIFICATE OF SERVICE
(omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

FEB 17 1976

MURRAY L. HARRIS, CLERK

BY

DEPUTY *Mildred C. Verret*

DR. N. JAY ROGERS

VS.

DR. E. RICHARD
FRIEDMAN, ET AL

§
§
§
§
§
§

CIVIL ACTION NO.
B-75-277-CA

ORDER PENDENTE LITE

Section 5.13(d) of the Texas Optometry Act, which prohibits an optometrist from practicing under a name other than the name under which he is licensed, is the subject of a direct constitutional attack in this case.

Plaintiff's office at 907 Congress Avenue, Austin, Texas, becomes subject to the prohibition of §5.13(d) during the pendency of this suit. To avoid the substantial irrevocable expense and disruption attendant to converting such office so as to conform to the mandate of §5.13(d), it is accordingly

ORDERED that the office of Texas State Optical at 907 Congress Avenue, Austin, Texas, is hereby declared exempt from the prohibitions of §5.13(d) and like "trade name" prohibitions of the Texas Optometry Act until 60

days after a final judgment is rendered by this court herein, or pending further order of the Court.

DONE this 16th day of February, 1976.

s/s

United States District Judge

APPROVED AS TO FORM
AND SUBSTANCE:

s/s

ROBERT Q. KEITH
ATTORNEY FOR PLAINTIFF

s/s

ROBERT L. OLIVER
ATTORNEY FOR DEFENDANT

A TRUE COPY I CERTIFY
MURRAY L. HARRIS, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS

By: *Mildred C. Verret*

[Original Proposed Final Judgment
Submitted by Plaintiffs]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS	§	
	§	
V.	§	C.A. NO. B-75-277-CA
	§	
DR. E. RICHARD	§	
FRIEDMAN, ET AL	§	

FINAL JUDGMENT

In accordance with the Memorandum Opinion of the Court dated September 12, 1977 in the above styled and numbered cause, it is the order and judgment of the Court that:

1. Dr. E. Richard Friedman, O.D., Dr. John W. Davis, O.D., Dr. John B. Bowen, O.D., Dr. Hugh A. Sticksel, Jr., O.D., and Dr. Salvador S. Mora, O.D., individually and as members of the Texas Optometry Board and their successors in office as such, are hereby restrained and enjoined from enforcing or attempting to enforce Article 4552-5.13(d), Revised Civil Statutes of Texas, as amended, and that portion of Article 4552-5.09(a), Revised Civil Statutes of Texas, as amended, reading, "any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials";

2. All relief not herein specifically granted is denied;

3. This judgment shall be considered for purposes of appeal and otherwise, as a final judgment in this case, and no stay of proceedings pending appeal will be granted by this Court.

DONE this ____ day of _____, 1977.

United States Circuit Judge

United States District Judge

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

DR. N. JAY ROGERS,
Plaintiff;

W. J. DICKINSON, Indi-
vidually and as President of
the Texas Senior Citizens
Association, Port Arthur,
Texas Chapter,
Intervenor

VS.

NO. B-75-277-CA

DR. E. RICHARD
FRIEDMAN, DR. JOHN
B. BOWEN, DR. HUGH A.
STICKSEL, JR., DR.
JOHN A. DAVIS, DR.
SAL MORA,
Defendants;

TEXAS OPTOMETRIC
ASSOCIATION, INC.,
Intervenor

OBJECTIONS TO PLAINTIFF'S PROPOSED
FINAL JUDGMENT

MOTION FOR JUDGMENT BY DEFENDANTS
AND INTERVENOR TOA

NOW COMES Defendants and Intervenor Texas
Optometric Association and make their objections to the
proposed final judgment heretofore submitted by the
attorney for Plaintiff on September 20, 1977; and as
grounds for objection would show the following:

1. Said proposed judgment by Plaintiff does not
clearly set forth the Court's declarations of
constitutionality and unconstitutionality regarding
Sections 2.02, 5.09(a), 5.13(d), and Section 5.15(e) of the
Texas Optometry Act, Article 4552, Revised Civil
Statutes of Texas.

2. Said proposed judgment does not limit the scope of
unconstitutionality and injunction to the specific
portion of Section 5.13(d) of the Texas Optometry Act
which the Court has declared unconstitutional.

3. Said judgment does not specifically overrule
Defendants' motion to dismiss for improper venue, as
contained in Defendants' Amended Answer.

4. Said proposed judgment of the Plaintiff makes no
reference to findings of facts and conclusions of laws as
set forth in the memorandum opinion dated September
12, 1977.

5. Said proposed judgment does not provide for
assessment of Court costs.

6. Said proposed judgment does not sufficiently
inform the parties and those acting in reliance upon the
Court's judgment that they do so subject to final
adjudication of the case upon appeal. In this regard the
Court's final judgment will likely be misinterpreted by
the members of the optometry profession throughout
the state if this clarification is not incorporated into the
judgment.

7. Defendants and Intervenor TOA have acted timely
in objecting to Plaintiff's proposed judgment and in
submitting their own proposed judgment. The
memorandum opinion of the Court, dated September
12, 1977 was mailed to counsel for Defendants and TOA
by transmittal of the District Clerk on September 20th.

Counsel for Plaintiff received a copy of the Memorandum Opinion on or about September 20, 1977. Such opinion was received in the mail by the Assistant Attorney General on September 22nd and by the Attorneys for TOA on September 23. The proposed judgment by Plaintiff was received in the mail by the above attorneys on September 23, and on the same date the Assistant Attorney General representing Defendants responded with a letter to the Court objecting to the proposed judgment by Plaintiff. On Monday, September 26th, Attorneys for Defendants in Beaumont likewise delivered an objection letter to the Court.

MOTIONS RE JUDGMENT

1. Accordingly, Defendants and Intervenor TOA respectfully pray that the proposed final judgment submitted by Plaintiff's counsel on September 20, 1977 not be signed and entered by the Court. In the alternative, if said judgment has been signed and entered, Movants pray that it be set aside.

2. Defendants and Intervenor TOA additionally move for judgment according to the attached "FINAL JUDGMENT".

Respectfully submitted,

NIEMANN & NIEMANN
1210 American Bank Tower
Austin, Texas 78701

512/474-6901

By _____
Larry Niemann

Attorneys for Texas Optometric
Association, Inc., Intervenor

JOHN L. HILL
Attorney General of Texas

s/s

DOROTHY PRENGLER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

JOHN TUCKER

ORGAIN, BELL & TUCKER
Beaumont Savings Building
Beaumont, Texas 77701

Attorneys for Defendants, Dr. E.
Richard Friedman, Et Al, in
their individual capacities

[In the United States District
Court for the Eastern District of Texas]

ORGAIN, BELL & TUCKER

ATTORNEYS AT LAW

BEAUMONT SAVINGS BUILDING

BEAUMONT, TEXAS

77701

October 3, 1977

RE: Civil Action No. B-75-277-CA
U. S. District Court - Beaumont
D. N. Jay Rogers, Plaintiff; W. J. Dickinson,
Individually and as President of the Texas Senior
Citizens Association, Port Arthur, Texas Chapter,
Intervenor vs. Dr. E. Richard Friedman, Dr. John
B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W.
Davis, Dr. Sal Mora, Defendants; Texas Optometric
Association, Inc., Intervenor

Hon. Murray L. Harris, Clerk
United States District Court
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

Dear Mr. Harris:

Promptly upon receipt of copy of the Memorandum
Opinion issued by the Three-Judge Court composed of
the Honorable Irving L. Goldberg, Honorable Joe J.
Fisher, and Honorable William M. Steger, attorneys for
Defendants and Intervenor commenced preparation of
a proposed judgment to dispose of the issues in this case

in accordance with the Memorandum Opinion. Before
we had an opportunity to submit our proposed
judgment, we were informed that the judgment
submitted by Plaintiff's attorney, Robert Q. Keith, was
in the process of being circulated and signed. Under
date of September 26, 1977, in a letter to Judges
Goldberg, Fisher, and Steger, we requested that entry
of the judgment be withheld until we could submit our
objections to Plaintiff's proposed judgment and our
suggested judgment, and we are now submitting
herewith the following:

- (1) Defendants' and Intervenor's Objections to
Plaintiff's Proposed Final Judgment;
- (2) Order Setting Aside the Judgment submitted by
attorney Robert Q. Keith (in the event it has
already been signed and filed); and
- (3) The judgment submitted by defendants and
intervenor.

We strongly feel that the judgment submitted by
Plaintiff's attorney does not fully and correctly dispose
of all issues and matters decided by the Court as set forth
in its Memorandum Opinion.

Accordingly, for the convenience of the judges, I am
sending them each a copy of this letter with a copy of the
instruments above referred to.

It is respectfully submitted that in order to dispose of
all issues and correctly reflect the Court's action as set
forth in its Memorandum Opinion, the final judgment as
proposed by Defendants and Intervenor, Texas
Optometric Association, Inc., is the correct one to be
entered.

If there is any question as to this matter, then
Defendants and Intervenor respectfully request they be
accorded a hearing before any judgment becomes final.

A-58

Very truly yours,

s/s
John G. Tucker

JGT/co
Enclosures

- cc: Hon. Irving J. Goldberg
United States Circuit Judge
Circuit Court of Appeals - Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130
- cc: Hon. Joe J. Fisher
United States District Judge
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704
- cc: Hon. William M. Steger
United States District Judge
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704
- cc: Hon. Robert Q. Keith
Mehaffy, Weber, Keith & Gonsoulin
1400 San Jacinto Building
Beaumont, Texas 77701
- cc: Ms. Dorothy Prengler
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
- cc: Mr. Larry Niemann
Niemann & Niemann
1210 American Bank Tower
Austin, Texas 78701

A-59

[In the United States District Court
For the Eastern District of Texas]

ORGAIN, BELL & TUCKER

ATTORNEYS AT LAW

BEAUMONT SAVINGS BUILDING

BEAUMONT, TEXAS

77701

October 11, 1977

RE: Civil Action No. B-75-277-CA
U. S. District Court - Beaumont
Dr. N. Jay Rogers, Plaintiff; W. J. Dickinson,
Individually and as President of the Texas Senior
Citizens Association, Port Arthur, Texas Chapter,
Intervenor vs. Dr. E. Richard Friedman, Dr. John
B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W.
Davis, Dr. Sal Mora, Defendants; Texas Optometric
Association, Inc., Intervenor

Hon. William M. Steger
United States District Judge
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

Dear Judge Steger:

Attorney Robert Keith has given me a draft of a new judgment which I understand will be submitted to you and other members of the Court. The defendants, Richard E. Friedman, et al, as well as the intervenor, Texas Optometric Association, Inc., have heretofore submitted a proposed judgment as well as objections to the judgment originally proposed by plaintiff.

The defendants and intervenor, Texas Optometric Association, Inc., strenuously object to certain provisions in the judgment now proposed by plaintiff, particularly the following:

(1) In Paragraph 2 of the plaintiff's present proposed judgment, *Section 5.11 of the Texas Optometry Act of Article 4552* is declared unconstitutional. We object to the entry of a judgment declaring this Section of the Act unconstitutional because:

- (a) *Section 5.11 of the Texas Optometry Act* was not mentioned in plaintiff's complaint;
- (b) These defendants and intervenor were not heard with respect to any complaint pertaining to *Section 5.11 of the Texas Optometry Act*; and
- (c) The Court's Memorandum Opinion does not mention *Section 5.11 of the Texas Optometry Act of Article 4552*, and there is nothing in the Memorandum Opinion indicating the intention of the Court to declare unconstitutional this Section of the Act which was not put in issue in this case.

By way of summary, defendants and intervenor, Texas Optometric Association, Inc., submit that it is clearly improper to now enter a judgment declaring a section of the Texas Optometry Act unconstitutional which has not heretofore been mentioned in this case.

(2) Defendants' and intervenor's proposed judgment in Paragraph 2, proceeding strictly in accord with the pleadings and the Memorandum Opinion, provided that *Section 5.13(d) of the Texas Optometry Act of Article 4552* was declared unconstitutional. This is the same section of the Act referred to in the plaintiff's original proposed judgment, and it is submitted that the declaration that *Section 5.13(d) of Article 4552* is

unconstitutional is the only appropriate provision to be included in the judgment and that the last three lines in Paragraph 3 of plaintiff's proposed judgment, reading as follows:

"Or any other provision of the Texas Optometry Act which prohibits in any way the practice of Optometry under a trade name,"

go beyond the scope of the pleadings and the Courts' Opinion and should not be included in the judgment.

Our objection is plaintiff only complained of certain enumerated sections of the Texas Optometry Act and that the judgment should be confined to a decision of whether or not these particular sections, which were the only ones actually passed on by the Court, were unconstitutional and that it is improper to enlarge on the pleadings and the Courts' Opinion so as to attempt to include other sections of the Texas Optometry Act which were not complained of, which were not in issue, and which were not passed on by the Court.

(3) Defendants and intervenor, Texas Optometric Association, Inc., object to the proposed Paragraph 5 of the judgment which instead of declaring *Section 2.02 of the Texas Optometry Act, Article 4552*, as being constitutional pursuant to the Court's Memorandum Opinion, proposes a negative finding to the effect that the Court did not really determine the issue. In other words, the issue before the Court was whether *Section 2.02 of the Texas Optometry Act, Article 4552*, was constitutional or not. In the Memorandum Opinion, the Court determined that it was constitutional, and we feel that the judgment should follow the pleadings and the Courts' Memorandum Opinion, and declare that *Section 2.02* is constitutional and not qualify the Courts' decision by the statement that it is not declared unconstitutional per se.

By way of summary, we submit that the judgment proposed by defendants and intervenor, Texas Optometric Association, Inc., is the correct judgment to be entered since it follows the pleadings and the Memorandum Opinion and directly disposes of the issues in exactly the manner set forth in the Court's Memorandum Opinion.

In view of the fact that I understand that the judgment may be circulated to all judges on the panel, I am taking the liberty of sending a copy of this letter to each and am filing copies with the Clerk.

Defendants and intervenor do not wish to unduly burden the Court, but we feel it is important that the judgment should follow the pleadings and issues determined by the Court set forth in the Memorandum Opinion.

If there is any question as to this matter, we respectfully request the right to be heard before a final judgment is entered.

Very truly yours,

s/s

John G. Tucker

JGT/co

cc: Hon. Murray L. Harris, Clerk
United States District Court
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

cc: Hon. Irving J. Goldberg
United States Circuit Judge
Circuit Court of Appeals - Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

cc: Hon. Joe J. Fisher
United States District Judge
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

cc: Hon. Robert Q. Keith
Mehaffy, Weber, Keith & Gonsoulin
1400 San Jacinto Building
Beaumont, Texas 77701

cc: Ms. Dorothy Prengler
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

cc: Mr. Larry Niemann
Niemann & Niemann
1210 American Bank Tower
Austin, Texas 78701

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF
TEXAS BEAUMONT DIVISION

DR. N. JAY ROGERS	§
VS.	§ CIVIL ACTION NO. B-75-277-CA
DR. E. RICHARD FRIEDMAN, DR. PHILLIP LEWIS, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., AND DR. SALVADOR S. MORA	§ § § § §

**MEMORANDUM OF AUTHORITIES IN
SUPPORT OF DEFENDANTS AND
INTERVENOR'S OBJECTIONS TO
PLAINTIFF'S PROPOSED JUDGMENT AND IN
SUPPORT OF JUDGMENT SUBMITTED BY
DEFENDANTS AND INTERVENOR**

Defendants and Intervenor have submitted a proposed judgment directly and specifically following the pleadings and the Court's Memorandum Opinion and disposing of the issues in exactly the manner set forth by the Court in its Opinion.

Objection is made to Paragraph 2 of plaintiff's proposed judgment which declares *Section 5.11* of the Texas Optometry Act unconstitutional because this section of the Act has not been mentioned in any of the pleadings, it was not referred to in the Court's Memorandum Opinion, and defendants and intervenor were not accorded a hearing with respect to any complaint or contention that *Section 5.11* of the Texas Optometry Act was unconstitutional as applied to the plaintiff.

Defendants and Intervenor, in Paragraph 2 of their proposed judgment, set forth in accordance with the pleadings and the Memorandum Opinion, the holding of the Court that Section 5.13(d) of the Texas Optometry Act of Article 4552 was unconstitutional. It is submitted that this is the proper judgment to be entered and not one declaring some other Section of the Act unconstitutional.

In Paragraph 3 of plaintiff's proposed judgment, plaintiff again seeks to enlarge upon the pleadings and the scope of the Court's Memorandum Opinion by declaring unconstitutional "any other provision of the Texas Optometry Act which prohibits in any way the practice of optometry under a trade name". The pleadings and the Court's Opinion did not refer to other provisions of the act. It is submitted that this general condemnation of unspecified provisions of the Texas Optometry Act and an injunction against the enforcement thereof is improper.

Attached hereto for the Court's convenience is a copy of Pgs. 294 through 308 of 16 Am.Jur.2d "Constitutional Law". The numerous cases there referred to set forth the rules which have invariably been followed with respect to judicial restraint in exercising the power to declare a statute unconstitutional. (1) The court will not assume to pass on constitutional questions not pled or brought directly into issue in the case; (2) The courts will not consider or determine hypothetical questions or anticipate constitutional issues, which may arise, but are not at issue in the case.

Defendant and Intervenor also respectfully refer the Court to the following cases:

(1) *Toyosaburo Korematsu vs. United States*, 65 S.Ct. 193, 3824 U.S. 241, wherein the Court held as follows in

refusing to pass on constitutional questions not raised by the pleadings:

"Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us."

(2) In *Solesbee v. Balkcom*, 70 S.Ct. 457, 339 U.S. 9, the Supreme Court stated:

"In accordance with established policy we shall not go beyond the constitutional issues necessarily raised by this record."

The Court then proceeded to rationalize their holding on the ground that they would not measure the statute by some possible future application and limited their holding to the specific statutes and application thereof directly involved in the case.

(3) The same rule was announced in *United States v. Appalachian Power Co.*, 61 S.Ct. 291, 311 U.S. 377, where the primary question had to do with the scope of the Federal Commerce Power in relation to conditions in licenses required by the Federal Power Commission for the construction of hydro-electric dams on navigable rivers. The Court refused to enlarge upon the scope of

the holding with respect to the constitutionality of the license, stating:

"We shall pass upon the validity of only those provisions of the license called to our attention by respondent as being unrelated to the purposes of navigation."

In light of the foregoing, Defendants and Intervenor also object to Paragraph 5 of plaintiff's proposed judgment, which instead of declaring Section 2.02 of the Texas Optometry Act, Article 4552, as being constitutional pursuant to the Court's Memorandum Opinion, proposes a negative finding to the effect that the Court really did not determine the issues at all. The question before the Court was whether this section of the Act was constitutional or not in the context of the attack being made on it. The Court upheld the constitutionality of this section of the Act and overruled plaintiff's contention that it was unconstitutional as applied to the facts before the Court. Accordingly, it is the position of Defendants and Intervenor that the judgment should follow the pleadings and the Court's Memorandum Opinion and specifically declare that Section 2.02 of the Act is constitutional and not attempt to qualify the Court's decision and thus embark on the forbidden grounds of considering and determining hypothetical or abstract questions which were not before the Court.

It is respectfully submitted that Defendants' and Intervenor's proposed judgment correctly disposes of the issues in the case in line with the Court's Memorandum Opinion.

A-68

Respectfully submitted,

s/s

John G. Tucker
ORGAIN, BELL & TUCKER
Beaumont Savings Building
Beaumont, Texas 77701

ATTORNEYS FOR
INTERVENOR, TEXAS
OPTOMETRIC ASSOCIATION,
INC.

CERTIFICATE OF SERVICE
(omitted in printing)

A-69

[In the United States District Court
for the Eastern District of Texas]

THE ATTORNEY GENERAL OF TEXAS

October 25, 1977

Hon. William M. Steger
United States District Judge
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

Re: *Dr. N. Jay Rogers v. Friedman, et al*, Civil Action
No. B-75-277-Ca

Dear Judge Steger:

Subsequent to the conference held on Thursday, October 20th in your chambers, there was a meeting of the Texas Optometry Board. I informed the Board members of the allegations made by Mr. Keith in his brief regarding alleged threats made by Board members to Dr. Rogers to the effect that the Board would attempt to circumvent the court's Memorandum Opinion in this case.

Needless to say, the Board members vehemently denied any such threats and were quite upset that these representations had been made to the Court. The Board members requested that I inform you that if you are so inclined, they would like the opportunity to refute these allegations by means of a hearing or affidavits. I am relaying this information to you in order to let you know that the Board in no way intends to circumvent any ruling of the Court.

Thank you for your cooperation.

A-70

Very truly yours,

Dorothy Prengler
Assistant Attorney General

DP:ch

cc: Mr. Robert Q. Keith
Mehaffy, Weber, Keith & Gonsoulin
1400 San Jacinto Building
Beaumont, Texas 77701

Mr. Murray L. Harris
U.S. District Clerk
Eastern District of Texas
P.O. Box 231
Beaumont, Texas 77704

bxc: Dr. N. Jay Rogers
Dr. Hugh A. Stickse
Dr. John B. Bowen
Dr. E. Richard Friedman
Dr. John W. Davis
Dr. Salvador S. Mora
Ms. Lois Ewald
Mr. Joe R. Greenhill, Jr.

A-71

[Filed in the United States District
Court for the Eastern District of Texas]

[McGUIRE CONTRACT]

STATE OF TEXAS

COUNTY OF
JEFFERSON

KNOW ALL MEN BY
THESE PRESENTS:

That Drs. S. J. Rogers and N. Jay Rogers, duly registered optometrists, doing business under the trade name of Texas State Optical, hereinafter referred to as FIRST PARTIES, and *Dr. Richard P. McGuire*, hereinafter referred to as SECOND PARTY, have entered into this Memorandum of Contract consisting of three (3) separate phases of agreement, to-wit:

- A. pp. 2 and 3 deleted
- B. Agreement for Joint Ownership of office by and between First Parties and Second Party.
- C. Sale of One Hundred (100%) per centum of First Parties interest in office.

DEFINITIONS APPLICABLE TO ALL PHASES OF
THIS CONTRACT

DEFINITION #1: WHEREVER THE WORDS TEXAS STATE OPTICAL are used, it is understood that such trade name encompasses the use of the words, letters, initials, symbols, or other designations of Texas State Optical, Texas Optical, State Optical, T.S.O., and other variations and abbreviations of same.

DEFINITION #2: All phases of this contract relate to the *No. 37 Haltom Office* belonging to First Parties, operated under the name Texas State Optical, located in *Fort Worth, Tarrant County, Texas* hereinafter called "the office", and no other office or offices of First Parties are involved in any phase of this contract.

DEFINITION #3: First Parties are the owners of Texas State Optical, and have offices in many cities in Texas, and conduct a general optometry practice and optical dispensing business consisting of the examining of eyes and fitting and selling of glasses and contact lenses to the public, and they have a considerable amount of money invested in said businesses.

DEFINITION #4: Second Party is duly licensed to practice optometry in the State of Texas, and is presently employed by First Parties, and he desires to continue to such employment by First Parties, and First Parties desire his services.

DEFINITION #5: Wherever notice is required by the terms of this contract, such notice shall be in writing and sent by Registered Mail to the following addresses: For the First Parties, Post Office Box 1310, Beaumont, Texas 77704; and for notice to the Second Party, 4019 E. Belknap, Fort Worth, Texas 76111.

DEFINITION #6: It is agreed by First Parties and Second Party that the place of payment for any monies payable to First Parties under this contract is to be Beaumont, Jefferson County, Texas.

B. OPERATION OF NO. 37 HALTOM OFFICE AS PARTNERSHIP

Effective the *1st* day of *March, 1970*, the *No. 37 Haltom Office* will be operated as a partnership by and between First Parties and Second Party under the terms and conditions as set forth herein.

1. The Office will be operated as a partnership comprised of First Parties and Second Party, with First Parties being regarded as a single partner and Second Party being regarded as the other partner. The term of this partnership shall be for a period of *three (3) years*, commencing as of the date set forth above and continuing through *February 28, 1973*, unless sooner terminated under the provisions contained in this Agreement.

2. The Parties hereto acknowledge that the subject office is an existing successful operation, and as such is of considerable present value. The partnership shall be capitalized solely by First Parties and no capital contribution shall be required of Second Party. Second Party shall be entitled to participate in any profits of the partnership, however, any and all losses of the partnership operation shall be sustained solely by First Parties as set forth hereinafter. It is acknowledged that the consideration due First Parties from Second Party in payment for the rights and interests herein granted shall be deferred and abated until such time as set forth in Section C of this Contract infra.

3. During the existence of this partnership, the profits and the losses of the partnership operation shall be shared by the partners on the following basis:

First Parties	<i>Fifty (50%) per cent</i>
Second Party	<i>Fifty (50%) per cent</i>

Provided, however, that if the loss in any fiscal year shall be such that Second Party's prorata share would reduce Second Party's capital account to a negative amount (deficit amount), then only so much of Second Party's prorata share of the loss as would reduce his capital account to exactly zero (and not to a negative or deficit amount) shall be attributed to Second Party and the balance of the loss in that fiscal year shall be attributed to First Parties and shall become a charge against First Parties' capital account, the First Parties shall have no right or reimbursement as against Second Party or the partnership by virtue of such disproportionate sharing of losses.

4. It is recognized that Second Party is an optometrist, licensed under the laws of the State of Texas, and that First Parties have entered into this agreement upon the predicate that Second Party will actively engage in the practice of optometry on a full time basis at the office occupied by the partnership, and will actively act as manager of said office during the term of this partnership agreement. In this connection, Second Party covenants that he will devote full time to the practice of optometry and to the management of the office of the partnership, and that during the term of this agreement, he will not engage in any other occupation, business or profession which would in any way interfere with his proper management or operation of the office. Second Party further covenants that he will be present in the office of the partnership on each working day (except a two (2) week annual vacation,

illness and emergencies), and that he will diligently perform his duties and conscientiously practice his profession at all times. As compensation for the aforesaid services, Second Party shall be paid a salary of One Hundred Seventy-five (\$175.00) Dollars per week, including a two (2) week vacation period, which salary shall be deemed an expenses of the partnership and not as a withdrawal of capital by Second Party. However, this salary arrangement is predicated on the assumption that Second Party shall personally be present at the office at all times during each working day as aforesaid, except during the two (2) weeks annual vacation, and also that Second Party will waive any annual vacation period if substitute personnel are not available, and in consideration for such waiver of vacation, shall be paid extra and in addition to his regular salary, an amount equal to two (2) weeks' salary. Second Party shall be allowed to draw monthly the amount of *Seven Hundred and No/100 Dollars (\$700.00)* against Second Party's share of the partnership profits.

5. It is expressly agreed that rules and regulations for the supervision and management of the partnership office and all policy matters relating to the office, shall be fixed and determined by First Parties in accordance with general policies prevailing in other Texas State Optical offices. It is agreed that the partnership shall retain the firm of Rogers Bros., Beaumont, Texas, for advisory and supervisory services, including among other services, accounting, advertising programming, and window and display programming, in consideration for which Rogers Bros. will be paid as compensation an amount equal to *four (4%)* percent of the net cash of the office, such compensation to be paid monthly.

First Parties shall determine and fix the general rules, regulations and policies for the management of

the office, in accordance with the good business and optometric practices and in accordance with the general policies prevailing in other comparable Texas State Optical Offices. This shall include, not to the exclusion of any other, the prevailing policies covering and concerning the examination of patients without regard to age, physical infirmity, nationality, race, creed, etc.; progress examinations and reexaminations; and all other applicable policies including the care and continued care of contact lens patients, transfer patients, and any other persons who have previously been patients of some other TSO Office, partnership TSO Office, or associate TSO Office. This shall include the right to determine whether Second Party shall be required to become a member of the Texas State Optical Association as more particularly set forth in Paragraph 18, Pages 12 and 13, Section C of this contract.

6. The parties hereto expressly agree that the office shall purchase all optical material, of every nature, including but not limited to frames, lenses, contact lenses, all prescription work, ophthalmic supplies, refracting equipment, and other optical supplies, from Rogers Bros., Beaumont, Texas, and that all optical laboratory work for the partnership created hereby shall be done by Rogers Bros., provided the charges made therefor by Rogers Bros. do not exceed the regular charges made by reputable optical laboratories for comparable quality of materials and workmanship.

7. First Parties are the owners of the trade name Texas State Optical (as defined), and First Parties hereby agree to grant the partnership the revocable license to use, during the term of the partnership and not thereafter, the trade name Texas State Optical and/or Texas State Optical of (*other variations*). It is expressly understood and agreed that the partnership has no right, title or interest in and to any of the

aforesaid trade names, but merely has a license to use the trade names during the term hereof. Upon the termination of this partnership for any reason, said license shall cease and terminate. It is further expressly understood and agreed that upon the termination of this partnership, Second Party shall have no right to the use of any of said trade names nor shall Second Party, at any time, allow any person, firm or corporation to use any of said trade names. Second Party further agrees that in the event of the termination of this partnership, Second Party will not refer to any advertising in any manner or at any time whatsoever to his former association with Texas State Optical or First Parties.

8. Except as otherwise specifically provided in the Agreement, this partnership may be terminated by First Parties or Second Party prior to the date set forth in Paragraph 1 only as set forth below:

- a. First Parties shall have the right to terminate this partnership in the event of (1) misconduct by Second Party; or (2) breach by Second Party of any of the covenants herein set out, then upon such termination, First Parties shall have the option to purchase from Second Party, Second Party's ownership interest in the partnership at a price equal to the amount of Second Party's partnership capital account. This option may be exercised by First Parties at any time within thirty (30) days after First Parties shall have given Second Party notice of such termination. Without limitation on generality of term "misconduct", it is agreed that said term shall include the following:

- (1) Conviction of a misdemeanor involving moral turpitude or of any felony;
- (2) Consumption of alcoholic beverage or liquor at any time during the working hours of the

partnership office, or the use of alcoholic beverages or liquors at any other time to the extent that same impairs the ability to properly perform managerial and professional duties;

(3) Addiction to or use of habit forming drugs;

(4) Suspension, cancellation or revocation or termination of optometric license;

(5) Consistent and willful refusal to follow management policies and procedures after receipt of written notice setting forth such deficiencies.

- b. Second Party shall have the right to terminate this partnership at any time by giving written notice to the First Parties of his election to so terminate, whereupon First Parties shall have the option to purchase Second Party's interest in the partnership at a price equal to the then amount of Second Party's partnership capital account. First Parties shall have a period of fifteen (15) days after receipt of such notice to exercise this option. In the event that First Parties fail or neglect to exercise their option, then the partnership shall be terminated and First Parties and Second Party shall hold the assets of the partnership as Tenants in Common.

9. First Parties and Second Party hereby agree that in the event of the demise of Second Party, First Parties shall purchase the ownership interest of Second Party in the partnership formed hereby and shall pay therefor to the estate or legal representative of Second Party, the amount of Second Party's death. It is further agreed that in the event of the bankruptcy of Second Party, First Parties shall purchase Second Party's partnership interest for a sum equal to the amount of Second Party's capital account in the partnership as of the effective date of Second Party's bankruptcy.

10. In the event of the death of either S. J. or N. Jay Rogers, the partnership formed hereby shall not be dissolved but shall be continued as between the survivor of the two and the remaining partner or partners. In the event of the death of both S. J. and N. Jay Rogers, their collective interest in the partnership shall be conveyed in accordance with Paragraph 3 of Section C, *infra*, effective as of the first day of the next month following the date of demise of S. J. and N. Jay Rogers or the survivor of the two, as the case may be.

11. Other than set forth herein, the sale or disposition of any ownership interest shall be made only with the consent and agreement of all parties.

12. In the event of the sale of First Parties interest in the partnership to Second Party, First Parties agree to refrain from competing with Second Party in accordance with the terms and provisions contained in this instrument, Part C, paragraph 10, *infra*. In the event of termination of this partnership by reason of First Parties acquiring the partnership interest of Second Party, then Second Party covenants and agrees that he will not actively engage in the practice of optometry within a three (3) mile radius of the location of the partnership office for a period of ten (10) years immediately following the disposition of his partnership interest to First Parties.

C. SALE OF ONE HUNDRED (100%) PERCENT OF FIRST PARTIES' INTEREST IN THE OFFICE

First Parties and Second Party do hereby agree that effective as of *March 1, 1973* (or sooner as hereinbelow provided), First Parties shall sell their remaining ownership interest in the office to Second Party, and Second Party agrees to purchase First Parties

remaining ownership interest in the office under the following terms and conditions:

1. The office shall consist of the records, equipment, furniture, fixtures, signs and all improvements, but shall not include stock inventory, accounts receivable, nor the bank account developed through deposits from office receipts prior to the effective date of transfer.

2. As consideration for such conveyance, Second Party shall pay First Parties *ten (10%)* percent of the net cash of the office for a period of *ten (10)* years commencing *March 1, 1973* and extending through *February 28, 1983*. The period for which such payments are payable being hereinafter referred to as the "payment period". For the purposes of this instrument net cash shall be defined as the total cash received by the office less refunds and/or bad checks. The foregoing percentage payments shall be paid monthly, for each and every month during the "payment period" on or before the tenth (10th) day of the month next following. Such payment shall be equal to *ten (10)* percent of the net cash of the office for the month immediately preceding. Example: In the event the net cash for the month of January, 1974, is Ten Thousand (\$10,000.00) Dollars, then One Thousand (\$1,000.00) Dollars shall be due and payable by Second Party to First Parties on or before February 10, 1974. Further, of the monthly payments made, as provided in this paragraph, an amount equal to four (4%) percent per annum simple interest rate shall be treated, construed and applied as interest and the remaining balance of such payment shall be treated, construed and applied as principal. The foregoing stated interest treatment is being agreed upon in accordance with the provisions of Section 483 of the Internal Revenue Code and regulations promulgated pursuant thereto and is subject to said regulations, official opinions, administrative rulings and/or judicial

determinations. If any such payments are not made when due (i.e., on or before the tenth (10th) day of the month next following), and if such default shall continue until the twenty-fifth (25th) day of such month, then and in that event, there shall be added to the sum then payable, a late handling charge in the amount of ten (10%) percent of the amount then due. It is further provided that in the event the Second Party does not make the required monthly payments as due for three (3) successive monthly periods, then and in that event, the contract shall automatically be terminated and all payments hereunder shall be considered as rents paid on the use of the office and all rights of ownership shall revert to First Parties. It is further agreed that in the event such reversion takes place, that the bank account, the accounts receivable, and the stock inventory shall not revert to the First Parties, but shall remain the property of Second Party subject to any other claims outstanding against such assets. Second Party agrees to execute all necessary instruments to effectuate such reversion.

3. First Parties may, at their option, accelerate the commencement date of the foregoing purchase arrangement from *March 1, 1973* to the first day of any month falling between the date of execution of this instrument and *March 1, 1973*. First Parties may exercise such option by giving to Second Party, thirty (30) days notice of their election to so accelerate. In such event, the "payment period" shall commence upon the effective date of purchase (as accelerated) and continue through *February 28, 1983*. The monthly percentage payments, as set forth in the preceding paragraph, shall be payable for each and every month during such "payment period".

4. Second Party agrees to use and keep daily sales report sheets, or records, similar to those used by First

Parties, and a copy shall be sent to First Parties daily as such records are made, and to make such information available to First Parties throughout the entire term of sales contract, and for so long thereafter as the name Texas State Optical (as defined) is used in Second Party's operation. Second Party agrees that First Parties shall have full access to the sales information, records, and/or books or receipts of the office in order to insure First Parties adequate proof of accuracy of all records and/or books or receipts. It is further agreed, from time to time, all records, reports, receipts, books, accounts and business operations may be audited by First Parties. In the event there are discrepancies Second Party shall pay for cost incurred.

Second Party shall have said books audited annually by a Certified Public Accountant in good standing under the provisions of the Accountancy Law of the State of Texas, and said Certified Public Accountant shall render an "Opinion" report, based on his examination and a copy shall be transmitted to First Parties within ninety (90) days after the close of each fiscal year. The provisions in this paragraph shall be applicable throughout the entire term of this sales contract, and for so long thereafter as the name Texas State Optical is used in Second Party's operation.

5. As a part of the consideration hereof, Second Party hereby agrees to purchase all optical material, of every nature, including but not limited to frames, lenses, contact lenses, all prescription work, ophthalmic supplies, refracting equipment, and other optical supplies from Rogers Bros. Laboratory for so long as Rogers Bros. or their successors in interest desire to do the laboratory work. Second Party agrees to pay for all purchases and/or laboratory work from Rogers Bros. Laboratory on a monthly basis by the tenth (10th) day of the following month. In the event any such payments are

not made when due and such default continued until the twentieth (20th) day of the month due, then and in that event Rogers Bros. Laboratory may add ten (10%) percent of the outstanding balance to such balance as a late payment charge to cover handling and collection charges on such balance. All charges for laboratory work done by Rogers Bros. will be as low or lower than the regular charges made by reputable optical laboratories for comparable quality of materials and workmanship. Shipping charges to be paid for by Second Party, as is the prevailing policy with other similar offices.

6. As long as the words or designation T.S.O. are used in any manner whatsoever, or any payments are owing under the terms of Paragraph 2 above, Second Party agrees to operate said office in accordance with the general policies and business practices as used by First Parties in their other Texas offices. Such practices shall specifically include, without limitation, hours of operation, personnel procedures, the pricing of services and/or products by First Parties. This shall include, not to the exclusion of any other, the prevailing policies covering and concerning the examination of patients without regard to age, physical infirmity, nationality, race, creed, etc.; progress examinations and reexaminations; and all other applicable policies including the care and continued care of contact lens patients, transfer patients, and any other persons who have previously been patients of some other TSO Office, partnership TSO Office, or associate TSO Office.

First Parties covenant that the policies and procedures maintained and/or instituted by them for the office shall be in accordance with good business and optometric practices and shall be consistent with the policies and procedures practiced in other comparable Texas State Optical offices. Any deviation by Second

Party from such practices or policies shall be promptly called to Second Party's attention as soon as practicable after discovery of such deviation by First Parties. Notice of such deviation shall be in written form and shall be sent to Second Party by Registered or Certified Mail, setting out in specific detail the deviation to which objection is taken. In the event such deviation continues for more than five (5) days after receipt of such notice, Second Party hereby agrees to pay First Parties Fifty (\$50.00) Dollars per day for each and every day following the five (5) day notice that such deviation continues.

It is specifically agreed and understood by and between the First Parties and the Second Party that the provisions of these paragraphs specifically shall apply to Second Party's operation so long as the name Texas State Optical (as defined) is used in Second Party's operation. These provisions will apply even though all payments required under this contract have been completed. In the event all payments under this agreement have been completed and such deviations continue after such due notice, Second Party shall immediately stop using the name Texas State Optical or other similar designation in any manner and shall remove any such descriptive name or symbols from or about his office.

7. Second Party hereby acknowledges the necessity of coordinating Second Party's Comprehensive General Liability and Professional Liability Insurance Coverage Program with that of First Parties. Second Party hereby agrees to maintain, at his own expense, adequate Comprehensive General Liability and Professional Liability Insurance of a form approved by First Parties and carried a reputable insurance company selected by First Parties. The limits of such insurance coverage shall be determined by First Parties in accordance with

the amounts carried by optometrists in other offices of First Parties, which limits in no event shall be less than; For bodily injury liability, One Hundred Thousand (\$100,000.00) Dollars for each person and Three Hundred Thousand (\$300,000.00) Dollars for each occurrence and; for property damage liability, Twenty-five Thousand (\$25,000.00) Dollars.

Second Party further agrees that they will conduct the handling of any professional liability claim in accordance with the policies and procedures set forth by First Parties. The Second Party further agrees to maintain, at all times, adequate Workmen's Compensation and Employer's Liability Insurance and Casualty Insurance (fire, extended coverage, vandalism and malicious mischief) on the fixtures, furniture and leasehold improvements in an amount of not less than Twenty Thousand (\$20,000.00) Dollars. Copies of such policies of insurance shall be furnished to First Parties and all such insurance shall be maintained in force throughout the term of this contract. First Parties shall be named as Mortgagees, as their interests may appear, under the loss payable provisions of the casualty policy maintained hereunder.

For ease in purchasing, maintaining, handling and claim administration, First Parties may require the Second Party place his

- a. Comprehensive General Liability Insurance
- b. Workmen's Compensation Insurance
- c. Professional Liability (malpractice) Insurance
- d. Contents Fire and Extended Coverage Insurance
- e. Hospitalization Insurance
- f. Other casualty coverage as may be agreed upon

through a broker designated by First Parties (and consequently through one insurance company). Both

parties recognize the advantages and advisability of obtaining uniform coverage and premiums in the placing of this insurance.

8. Second Party agrees to continue to use the prescription form maintained by First Parties (including any changes made during the term of this contract) and that no other form shall be substituted therefor. Any other general accounting forms instituted in the offices of the First Parties shall also be applied with due diligence to the operation of the office by Second Party. Second Party further agrees to comply with prevailing policies relating to honoring requests by patients, customers, or other offices for transfers of records, or copies of such records.

9. First Parties agree that for so long as Second Party is not in default as to the covenants and conditions of this contract, First Parties will not open a like or similar optometric business for the practice of optometry nor grant any Third Party the right to open a like or similar optometric business under the name T.S.O. (as defined) for the practice of optometry, within that certain area described in Exhibit "A" attached hereto and hereinafter referred to as the "excluded area". Second Party agrees that in the event he leaves the employ of, or association with, First Parties for any reason, he will not engage in or operate any optometric office or business, directly or indirectly, within the said "excluded area" for a period of five (5) years from the date that this contract, or association is terminated, for whatever cause it may be terminated. Second Party further agrees that in the event he leaves the employ of, or association with, First Parties for any reason, he will not refer in any advertising in any manner or at any time whatsoever, to his former association with Texas State Optical or First Parties.

10. First Parties agree that for so long as Second Party is not in default as to the covenants and conditions of this contract, his ownership of the office shall include the right to use the trade name Texas State Optical (as defined) within and only within, the "excluded area" as set forth in Exhibit "A". It is acknowledged, however, that there may exist from time to time, sales contracts for other offices within close proximity to the boundaries of the "excluded area" and that the protected area of such offices may coincide with part of the protected area of the *No. 37 Haltom* office. In such event, Second Party shall not (nor shall the purchaser of such other office) have the right to open or operate an office within that part of the "excluded area" that also comprises part of the protected area of another office. Second Party hereby agrees to first obtain the written approval of the First Parties prior to the location or relocation of any optometric or optical office within the "excluded area" described in Exhibit "A" attached hereto, which approval First Parties agree not to unreasonably withhold.

11. Second Party agrees that as the owner of the office, he will continue to operate said office in an efficient and businesslike manner, in order to promote the greatest success of the office. Second Party covenants that he will devote full time to the practice of optometry and to the management of the office, which is the subject matter of this contract, and that during the entire purchase term (payout period) of this agreement, he will not engage in any other occupation, business or profession which would in any way interfere with his proper management or operation of the office.

12. So long as such programs are available to other offices of First Parties, Second Party agrees that his office will remain a member of the Rogers Pension Plan, and of various benefit programs such as hospitalization

insurance and disability insurance. These items are set out as illustrations of this provision and not as limitations thereof.

13. First Parties and Second Party agree that if, by reason of legislative action, court decisions or administrative rulings, the manner or style of operation of said office and business is required to change, that both parties will conduct the business and practices and operation of said office within the laws governing the practice of optometry in Texas at all times. For example: Should the prohibition of certain forms of advertising in Texas become law, both parties hereby agree to abide at all times by the laws governing the practice of optometry and the conduct of operating an optometry office and business in Texas.

14. Second Party agrees that during the payment period of this contract, he will not, without prior written approval of First Parties, sell, assign, convey, transfer, lease or sub-lease all or any part of the office being purchased in whole or in part under this contract, with the exception of conveyances in connection with the normal replacement of physical assets because of wear and tear or obsolescence. Second Party further agrees that in the event a sale, assignment, conveyance, transfer, lease or sub-lease is permissible under the terms of this contract and is made, that such contractual arrangement shall be subject to all of the then applicable provisions of this contract and that the purchaser, lessee, assignee, etc., will specifically accept the provisions of this contract.

In the event of a bona fide offer in writing by a Third Party to purchase the office, and the Second Party desires to sell on the basis of such bona fide offer, Second Party agrees to first offer the First Parties the same opportunity to purchase on the same terms. In the event

of a refusal to so purchase by First Parties, Second Party must then accept such bona fide offer by the Third Party.

In the event any such bona fide offer is made by a Third Party, communicated to First Parties, and refused by them, Second Party must then proceed to make sure sale to the Third Party. In the event such sale is not made to the Third Party, Second Party agrees to pay to First Parties an amount equal to ten (10%) percent of the offered price to cover First Parties' cost of investigation, consideration, and handling of the transaction.

Any such offers communicated to First Parties by Second Party will be made with the understanding that the First Parties shall have fifteen (15) days from the date such offer is received to either accept or reject such offer.

In the event any such bona fide offer to purchase is rejected by First Parties, Second Party will then have a sixty (60) day period in which to complete the sale to the Third Party, or to pay First Parties for their costs of investigation, consideration, and handling of such bona fide offer.

15. Second Party hereby agrees that during the payment period of this contract, and thereafter, for so long as the trade name T.S.O. (as defined) is used in Second Party's operation, all advertising (including without limitation), television, newspaper and radio, will be arranged for solely by First Parties in accordance with the following:

- a. It is acknowledged that advertising by television, radio and newspaper directed toward the *Dallas-Fort Worth* market area is to the mutual benefit of all TSO offices in that area, therefore, Second

Party recognizes his obligation and agrees to pay his proportionate share of the expenses for such advertising on the following basis:

(1) The percentage of television, radio and newspaper advertising costs born by the office of Second Party shall be computed by taking the accumulated gross annual sales for all offices within the *Dallas-Fort Worth* market area, including Second Party's office, and a percentage determined which is equal to the percentage of Second Party's office sales of the total sales of T.S.O. offices within such area; this percentage will be the percentage used in computing the office's proportionate share of such advertising expenses.

(2) The above percentage will be applied to all of the aforementioned market area television, radio and newspaper advertising costs incurred during the next following calendar year, on a monthly basis, and such amount will be charged to Second Party's office monthly. Payment of such charge shall be made on or before the tenth (10th) day of the month next following. At the end of each calendar year, a new percentage figure will be determined in the amount as described above based on the percentage of the sales for that year, and the percentage figure thus obtained shall be applied in a like manner to all such advertising costs for the next year following.

- b. It is acknowledged that, from time to time, First Parties may deem it advisable to advertise in regional publications and/or national publications circulated regionally and Second Party hereby agrees to pay his pro-rata share of the cost of such advertising based on the ratio of sales of the office

of Second Party of the total sales of all T.S.O. offices.

- c. Cost as referred to herein shall include actual production cost of media and any other cost directly related thereto.
- d. In addition, an amount equal to eight (8%) percent of Second Party's advertising cost as herein described shall be paid by Second Party to First Parties for reimbursement to First Parties for the production costs of such advertising. Example: If Second Party's total monthly billing for advertising amounts to Five Hundred (\$500.00) Dollars, the amount of Forth (\$40.00) Dollars will be paid to the First parties for production costs of advertising.
- e. In no event, however, will the liability of Second Party for all such advertising and production costs exceed an amount equal to eight (8%) percent of the gross sales of Second Party for a like period of time.

16. During the payment period of this contract, Second Party agrees to continue the operation of the office under the name T.S.O. (as defined) in all connections and in every aspect as to the operation of this office. Second Party agrees to operate said office in accordance with the general policies and business practices used by First Parties in other Texas offices. Such practices shall specifically include, without limitation, personnel policies and procedures, hours of operation, and the pricing of services and/or products by First Parties. First Parties covenant that the policies and procedures maintained and/or instituted by them for the office shall be in accordance with the policies and procedures practiced in other comparable Texas State

Optical Offices. Any deviation by Second Party from such practices or policies shall promptly be called to Second Party's attention as soon as practicable after discovery of such deviation by First Parties. Notice of such deviation shall be in written form and shall be sent Second Party by Registered or Certified Mail by setting out in specific detail the deviation to which objection is taken. In the event such deviation continues for more than five (5) days after receipt of such notice, Second Party hereby agrees to pay First Parties Fifty (\$50.00) Dollars per day for each and every day following the fifth (5th) day that such deviation continues.

After such payout period and for as long as the name T.S.O. is used by Second Party, Second Party agrees to operate said office in accordance with the general policies and business practices as used by First Parties in their other Texas Offices. Such practices shall specifically include, without limitation, hours of operation, pricing of services, and/or products by First Parties, as set forth above. Any deviations from such practices or policies shall be promptly called to Second Party's attention as soon as practicable after discovery of such deviations by First Parties. In the event the five (5) day notice is given and the Second Party does not correct or change such practices, then Second Party shall forthwith cease to use the name T.S.O. (as defined) in every respect.

Second Party shall pay all costs incurred in enforcing this contract, including attorney's fees, court costs, and/or other legal expense.

17. First Parties agree that Second Party is entitled to participate in any group optical plan agreement entered into by First Parties and Second Party agrees to provide materials and services in accordance with the terms of any such agreement to the extent patients

and/or customers of Second Party are entitled to benefits thereunder.

18. If, by operation of law, Doctors of Optometry are unable to conduct the practice of optometry under a trade name (i.e. T.S.O.) and it becomes necessary to change the form of operation to come within such law, Second Party agrees to make the necessary changes in order to effect the results and intent of this agreement as expressed herein. If it becomes legally necessary to separate, by means of a sub-lease agreement or otherwise, the practice of optometry from the sale and/or dispensing of optical goods, it is understood that the percentage payments for the purchase of the office as hereinbefore expressed (Section C, Paragraphs 2 and/or 3) shall include as percentage of cash all of the cash received for professional services and/or optical goods, howsoever or by whomsoever such optical goods and services are sold or dispensed, and shall include hearing aids and other allied and incidental products as may be applicable, it being agreed that in the event such change is made, the T.S.O. trade name shall be used for the dispensing optician business of the office operation, as distinguished from the practice of optometry, during the entire payout period, and beyond, if desired by Second Party. In addition and/or in the alternative First Parties may designate Texas State Optical Association, or another association, membership in which may be required of Second Party, to effectuate fully the intent and purposes of this contract. Second Party agrees to membership in such association, if deemed appropriate, by First Parties, to effectuate fully the intent and purposes of this contract. Second Party's membership costs shall be paid for by his office, it being the pro-rata share of the Association's operational costs and shall be the percentage of the gross sales of Second Party's office to the gross sales of all of the Association member

offices, but in no event shall annual cost to Second Party's office be greater than one (1%) percent of annual gross sales of Second Party's office. For example: If the annual operation cost is \$10,000.00, and Second Party's annual gross sales are \$200,000.00, and the annual gross sales of all association member offices are \$10,000,000.00 - then Second Party's pro-rata share of the cost would be two (2%) percent of \$10,000.00, or \$200.00.

19. It is hereby specifically agreed by and between the First Parties and Second Party that in the event any part of a paragraph or a section of this contract be declared void and of no effect by operation of law, or otherwise, that the voiding of any such provision or part of this contract and agreement shall not nullify or void the remainder of this contract and agreement. It is the intent of both the First Parties and the Second Party that this agreement be carried out to its fullest extent and both parties agree to exercise their best efforts toward the carrying out of this agreement except where prevented by operation of law.

The undersigned Parties hereby bind their heirs, assigns, and/or legal representatives.

EXECUTED IN DUPLICATE ORIGINALS, this 9th day of February, A.D., 1970.

s/s
S. J. Rogers, O. D.

s/s
N. Jay Rogers, O. D.

s/s
Richard P. McGuire, O. D.

STATE OF TEXAS

COUNTY OF JEFFERSON

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared S. J. Rogers and N. Jay Rogers, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they each executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 10th day of February, A.D., 1970.

s/s
Notary Public in and for
Jefferson County, Texas

STATE OF TEXAS

COUNTY OF TARRANT

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared Richard P. McGuire, known to me to be the person(s) whose name(s) is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF
OFFICE, this 9th day of February, A.D., 1970.

s/s

Notary Public in and for
Tarrant County, Texas

STOCK INVENTORY AND ACCOUNTS RECEIVABLE

As of the 1st day of March, 1973, Second Party shall purchase from First Parties the stock inventory and current accounts receivable of the office set forth below in accordance with the following:

a. A detailed accounting of the said office's stock inventory will be completed as of the effective date of sale and Second Party shall purchase such stock inventory of the said office as of such date. The total sales price of such stock inventory shall be computed on the basis of the then Rogers Bros. catalog price of such inventory as would be paid by Second Party if he were purchasing directly from Rogers Bros. Laboratory or as would be paid by other associate or partnership offices of Texas State Optical. The total amount of such stock inventory shall be paid in six (6) equal successive monthly installments, without interest, commencing six (6) months after the effective date of sale.

b. Second Party shall purchase the current accounts receivable of said office at an amount equal to eighty-five (85%) percent of the total amount of such current accounts receivable as of the effective date of sale. A "current account receivable" shall be defined as any account for which a payment has been credited within the

ninety(90) day period immediately preceding the date of determination. A detailed accounting of the accounts receivable for the said office will be effected so as to determine the exact total amount of such current accounts receivable as of the opening of business on the effective date of sale. Payment for such accounts receivable shall be made in three (3) equal successive monthly installments, without interest, commencing three (3) months after the effective date of sale. The non-current accounts receivable (over ninety days without a payment) shall not be purchased by Second Party, but eighty-five (85%) percent of the total collections thereon shall be remitted to First Parties.

WITNESS OUR HANDS this 9th day of February, A. D., 19 70.

s/s

S. J. Rogers, O. D., First Party

OFFICE:

No. 37 Haltom

s/s

N. Jay Rogers, O. D., First Party

s/s

Richard P. McGuire, O.D.
Second Party

EXHIBIT "A" TO CONTRACT DATED 9th DAY OF February, 1970.

The term "excluded area" as used in this Contract shall be defined as that area falling within a two (2) mile radius of the No. 37 Haltom Office at its location as of the date of execution of this Contract. It is specifically

A-98

provided, however, that any Texas State Optical Office in operation as of the date of execution of this Contract and falling within said two (2) mile radius shall be excepted from the provisions of Paragraph 9, Page 9, of this Contract.